(10)

No. 05-6551
Title: John Cunningham, Petitioner
v.
California
Docketed: September 22, 2005
Lower Ct: Court of Appeal of California, First Appellate District
Case Nos.: (A103501)
Decision Date: April 18, 2005
Rehearing Denied: May 4, 2005
Discretionary Court
Decision Date: June 29, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 17 2005	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 24, 2005)
Nov 3 2005	DISTRIBUTED for Conference of November 23, 2005.
Nov 8 2005	Response Requested . (Due December 8, 2005)
Dec 1 2005	Order extending time to file response to petition to and including December 22, 2005.
Dec 12 2005	Brief of respondent California in opposition filed.
Dec 15 2005	Reply of petitioner John Cunningham filed.
Jan 11 2006	DISTRIBUTED for Conference of February 17, 2006.
Feb 21 2006	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Feb 24 2006	Motion to appoint counsel filed by petitioner.
Mar 15 2006	Motion DISTRIBUTED for Conference of March 31, 2006.
Mar 21 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 8, 2006.
Apr 3 2006	Motion to appoint counsel filed by petitioner GRANTED. Peter Gold, Esquire, of San Francisco, California is appointed to serve as counsel for the petitioner in this case.
May 4 2006	Joint appendix filed.
May 4 2006	Brief of petitioner John Cunningham filed.
May 8 2006	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
May 16 2006	Extension of time within which to file respondent's brief on the merits to and including July 12, 2006.
Jul 12 2006	Brief amici curiae of Hawaii, et al. filed.
Jul 12 2006	Brief of respondent California filed.
Jul 14 2006	SET FOR ARGUMENT on Wednesday, October 11, 2006.
Jul 17 2006	CIRCULATED.
Aug 4 2006	Record received from Court of Appeal of California, 1st District, Division 5.
Aug 16 2006	Reply of petitioner John Cunningham filed. (Distributed)
Sep 25 2006	Letter from counsel for the respondent received. (Distributed).
Oct 11 2006	Argued. For petitioner: Peter Gold, San Francisco, Cal. (Appointed by this Court.) For respondent: Jeffrey Laurence, Deputy Attorney General, San Francisco, Cal.

05-6551

No. 05 -

ORIGINAL

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2005

SEP 17 2005

JOHN CUNNINGHAM,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

PETER GOLD*
2269 Chestnut Street, #124
San Francisco, CA 94123
(510) 872-6305
Counsel for Petitioner

*Counsel of Record

RECEIVED
SEP 22 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA'S DETERMINATE SENTENCING LAW, BY PERMITTING SENTENCING JUDGES TO IMPOSE ENHANCED SENTENCES BASED ON THEIR DETERMINATION OF FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS 9

A. Introduction 9

B. California Law Directly Contravenes This Court's Precedents And Must Be Corrected To Avoid Further Constitutional Encroachments 10

C. A Split Of Authority Has Developed In The State Courts Regarding The Application Of *Blakely* and *Booker* To Sentencing Schemes Like California's Determinate Sentencing Law 18

D. This Case Presents An Excellent Vehicle For Considering The Question Presented 20

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 20

Apprendi v. New Jersey, 530 U.S. 466 (2000) 9

Blakely v. Washington, 542 U.S. 296, 125 S.Ct. 2531 (2004) 6

In re Winship, 397 U.S. 358 (1970) 11

Lopez v. State, 113 P.3d 713 (Colo. 2005) 18

Mullaney v. Wilbur, 421 U.S. 684 (1975) 11

People v. Arauz, 5 Cal.App.4th 663 (Cal.App. 1992) 12

People v. Arceo, 95 Cal.App.3d 117 (Cal.App. 1979) 13

People v. Black, 35 Cal.4th 1238 (Cal. 2005) 7

People v. Fernandez, 226 Cal.App.3d 669 (Cal.App. 1990) 14

People v. Jackson, 196 Cal.App.3d 380 (Cal.App. 1987) 13

People v. Levitt, 156 Cal.App.3d 500 (Cal.App. 1984) 13

People v. Young, 146 Cal.App.3d 729 (Cal.App. 1983) 14

Ring v. Arizona, 536 U.S. 584 (2002) 11

Smylie v. State, 823 N.E.2d 679 (Ind. 2005) 18

Specht v. Patterson, 386 U.S. 605 (1967) 11

State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (N.C. 2005) 18

State v. Brown, 209 Ariz. 200, 99 P.3d 15 (Ariz. 2004) 18

State v. Dilts, 337 Or. 645, 103 P.3d 95 (Or. 2004) 18

State v. Gomez, 163 S.W.3d 632 (Tenn. 2005) 19

State v. Maugaotega, 107 Haw. 399, 114 P.3d 905 (Haw. 2005) . . . 19

State v. Natale, 184 N.J. 458, 878 A.2d 724 (N.J. 2005) 18

State v. Shattuck, 689 N.W.2d 785 (Minn. 2004) 18

United States v. Booker, ___ U.S. ___, 125 S.Ct. 738 (2005) 9

United States v. Gaudin, 515 U.S. 506 (1995) 11

United States v. Neder, 527 U.S. 1 (1999) 21

STATUTES

CALIFORNIA PENAL CODE

Section 288.5 3

Section 1170 3

Section 1203.03 3

UNITED STATES CODE

28 U.S.C. section 1257 2

CALIFORNIA RULES OF COURT

Rule 4.408 6

Rule 4.420 12

Rule 4.421 5

Rule 4.423 6

UNITED STATES CONSTITUTION

Sixth Amendment 2

Fourteenth Amendment 3

No. 05 -

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2005

JOHN CUNNINGHAM,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

Petitioner John Cunningham respectfully prays that a Writ of Certiorari issue to review the decision of the California Court of Appeal entered on April 18, 2005.

OPINIONS BELOW

The California Court of Appeal issued its unpublished opinion in this case on April 18, 2005, with Presiding Justice Jones both concurring and dissenting. A copy of that opinion is attached as Appendix A. On May 4, 2005, the Court of Appeal issued a one-page order denying a rehearing and modifying its opinion. A copy of that order is attached as Appendix B. The California Supreme Court issued a one-page order denying discretionary review of the Court of Appeal's decision on June 29, 2005. A copy of that order is attached as Appendix C.

JURISDICTION

The California Supreme Court denied discretionary review on June 29, 2005. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

B. State Statutory Provisions

California Penal Code section 288.5, subdivision (a) provides in relevant part:

> "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense . . . or three or more acts of lewd or lascivious conduct . . . with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and *shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.*" (Emphasis supplied.)

California Penal Code section 1170, subdivision (b) provides in relevant part:

> "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. . .* . In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons

for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. (Emphasis supplied.)

C. State Rules of Court

Relevant California Rules of Court, which are attached as Appendix D, include the following:

Rule 4.401. Authority
Rule 4.405. Definitions
Rule 4.406. Reasons
Rule 4.408. Criteria not exclusive; sequence not significant
Rule 4.409. Consideration of criteria
Rule 4.420. Selection of base term of imprisonment
Rule 4.421. Circumstances in aggravation
Rule 4.423. Circumstances in mitigation

STATEMENT OF THE CASE

In an indictment filed on March 14, 2001, the state charged petitioner John Cunningham in Contra Costa County Superior Court with one count of continuous sexual abuse in violation of California Penal Code section 288.5, as follows:

> "On or about January, 2000 through December, 2000, at San Pablo, in Contra Costa County, the Defendant, JOHN E. CUNNINGHAM, who resided in the same home with and had recurring access to John Doe, who was a minor child under the age of 14 years, from January, 2000, to December, 2000, a period of not less than three months in

duration, did unlawfully engage in three and more acts of lewd and lascivious conduct with the child." CT 192.[1]

On May 30, 2003, the jury convicted Mr. Cunningham as charged, stating in its verdict form that it found Mr. Cunningham guilty of "a violation of PC Sec. 288.5, (continuous sexual abuse), as set forth in the indictment." CT 460. Other than what was stated on its verdict form, the jury made no other factual findings regarding Mr. Cunningham or his guilt.

At the August 1, 2003 sentencing hearing, the trial court first denied Mr. Cunningham probation. RT 728. The court then found the existence of six aggravating factors pursuant to the California Rules of Court: (1) great violence, great bodily harm, and threat thereof disclosing a high degree of viciousness and callousness (rule 4.421(a)(1)), (2) a vulnerable victim due to his age and dependence on Mr. Cunningham as his father and primary caretaker (rule 4.421(a)(3)), (3) a threat of bodily injury to coerce the victim to recant (rule 4.421(a)(6)), (4) taking advantage of a position of trust or confidence as the victim's father and caregiver (rule 4.421(a)(11)), (5) engaging in violent conduct which indicates a serious danger to society (rule

[1] Citations to "CT" denote the Clerk's Transcript filed in the California Court of Appeal, followed by the page reference. Citations to the Reporter's Transcript on Appeal are denoted "RT."

4.421(b)(1)), and (6) employment as a police officer (rule 4.408(a)). RT 728-729. The court found one mitigating factor: Mr. Cunningham's lack of any prior record (rule 4.423(b)(1)). RT 728. The court then determined that the factors in aggravation outweighed the factor in mitigation, and sentenced Mr. Cunningham to the upper term of 16 years in state prison for the continuous sexual abuse conviction. RT 729-730. That same day, Mr. Cunningham filed a timely notice of appeal. CT 589.

Relying on this Court's decision in *Blakely v. Washington*, 542 U.S. 296, 125 S.Ct. 2531 (2004), Mr. Cunningham contended on appeal that he was deprived of his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process because the trial court imposed the upper term of 16 years by relying on aggravating factors found true neither by a jury nor beyond a reasonable doubt. The state Court of Appeal rejected this claim, finding that under California's Determinate Sentencing Law (the "DSL"), which provides for the imposition of a lower, middle, or upper term, "the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment." Opinion at 16. Presiding Justice Jones dissented from this portion of the majority's

opinion, concluding that *Blakely* compelled a remand for resentencing since "[u]nder California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term." Conc. & dis. opn. of Jones, P.J. at 1-2. On May 4, 2005, the Court of Appeal issued a one-page order denying Mr. Cunningham's petition for rehearing[2] and modifying its opinion. Appendix B.

On May 19, 2005, Mr. Cunningham petitioned the California Supreme Court for discretionary review of this issue. On June 20, 2005, while Mr. Cunningham's petition was pending, the California Supreme Court decided *People v. Black*, 35 Cal.4th 1238 (Cal. 2005), holding that criminal defendants have no federal constitutional right to a jury trial on aggravating factors used to impose an upper term sentence under the DSL. On June 29, 2005, that court issued an order denying Mr. Cunningham's Petition for Review "without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black* (June 20, 2005, S126182) ___ Cal.4th ___, 2005 WL 1421815 . . . regarding the effect of *Blakely v. Washington* (2004) 542 U.S. ___, 124 S.Ct.

---

[2] The Court of Appeal's order erroneously states that it denied Respondent's petition for rehearing; Mr. Cunningham, the appellant, was the only party to have filed a petition for rehearing.

2531, and *United States v. Booker* (2005) 543 U.S. ___, 125 S.Ct. 738, on California law." Appendix C. *Black* has since become final, with no change in the opinion. *See People v. Black, supra,* 35 Cal.4th 1238.

This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA'S DETERMINATE SENTENCING LAW, BY PERMITTING SENTENCING JUDGES TO IMPOSE ENHANCED SENTENCES BASED ON THEIR DETERMINATION OF FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

As this Court has repeatedly made clear, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *See, e.g., Blakely v. Washington, supra,* 124 S.Ct. at p. 2536; *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000). Most recently, the Court has applied this constitutional mandate to invalidate Washington state's sentencing scheme and the Federal Sentencing Guidelines to the extent they permitted judicial fact-finding of aggravating factors to justify the imposition of a sentence greater than the maximum authorized by the jury's verdict or defendant's admissions. *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005) [Federal Sentencing Guidelines]; *Blakely v. Washington, supra,* 124 S.Ct. 2531 [Washington state's sentencing scheme].

Despite the Court's authorities in this area, California has now decided that its determinate sentencing scheme, the DSL, does not offend

the Sixth or Fourteenth Amendments even to the extent that it permits a trial judge to impose an upper term sentence based on factors in aggravation found true neither by a jury nor beyond a reasonable doubt. *People v. Black, supra,* 35 Cal 4th 1238; *see also* Opinion at 16-17. In light of California's position, certiorari is appropriate in this case for two reasons. First, this recently-settled California law directly contravenes *Blakely* and *Apprendi*. Certiorari is therefore necessary to forestall California from continuing to violate the constitutional rights of thousands of criminal defendants during sentencing. Second, a split of authority compelling resolution has now arisen in the state courts in the aftermath of *Blakely* and *Booker* regarding the application of these cases to sentencing schemes just like California's DSL. Because this case is an ideal one for resolving the important question presented, this Court should grant certiorari and hold that California's DSL, as is being applied to permit the imposition of enhanced sentences based on judicial fact-finding, violates the Sixth and Fourteenth Amendments.

B. California Law Directly Contravenes This Court's Precedents And Must Be Corrected To Avoid Further Constitutional Encroachments.

The Sixth and Fourteenth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a

reasonable doubt." *United States v. Gaudin,* 515 U.S. 506, 509-510 (1995); *see also Mullaney v. Wilbur,* 421 U.S. 684, 698 (1975); *In re Winship,* 397 U.S. 358, 363-364 (1970). Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Sixth Amendment requires to be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490; *Mullaney v. Wilbur, supra,* 421 U.S. at p. 698; *Specht v. Patterson,* 386 U.S. 605, 607 (1967). In *Apprendi*, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490; *see also Ring v. Arizona,* 536 U.S. 584, 609 (2002) [Sixth Amendment mandates that existence of an aggravating factor necessary for imposition of death penalty must be found by a jury rather than a sentencing judge].

Blakely v. Washington, supra, further elaborated on the right to a jury determination of non-recidivist aggravating factors beyond a reasonable doubt. There, the Court held that Washington state's sentencing procedure violated the Sixth Amendment because it permitted the trial court to impose a sentence above the "standard range" or

statutory maximum if it found the existence of an aggravating factor demonstrating substantial and compelling reasons for an exceptional sentence. 124 S.Ct. at p. 2538. As the Court explained:

> "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts." *Id.* at p. 2537 (emphasis in original).

California's DSL employs a system of sentencing choices much like Washington's sentencing scheme at issue in *Blakely*. Under California Penal Code section 1170, subdivision (b), "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the court shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime." (Emphasis supplied.) *See also* Cal. Rules of Court, rule 4.420(a) ["The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation."]. Thus, under the DSL, the middle term is the presumptive sentence, *see, e.g.*, *People v. Arauz*, 5 Cal.App.4th 663, 666 (Cal.App. 1992) (maj. opn.) and 674 (conc. & dis. opn. of Yegan, J.)), or as in *Blakely*, the "statutory maximum" allowable for the particular offense. In fact, a sentencing

judge in California need not even state reasons for imposing the middle term. *People v. Arceo,* 95 Cal.App.3d 117, 121 (Cal.App. 1979).

Furthermore, as with Washington's sentencing procedure, in California, the upper term may only be imposed where "exceptional" circumstances in the form of aggravating factors exist justifying a departure from the middle term. *See, e.g., People v. Jackson,* 196 Cal.App.3d 380, 390-391 (Cal.App. 1987); Cal. Rules of Court, rule 4.420(b) ["Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation."]. California's Rules of Court also only require that the sentencing judge find circumstances in aggravation by a preponderance of the evidence. Cal. Rules of Court, rule 4.420(b); *see also People v. Levitt,* 156 Cal.App.3d 500, 515 (Cal.App. 1984).

California Rules of Court, rule 4.421 sets forth a non-exhaustive list of circumstances which may constitute aggravating factors. Rule 4.408(a) provides that for purposes of making discretionary sentencing decisions, the sentencing court may consider "additional criteria reasonably related to the decision being made." *Cf. Blakely v. Washington, supra,* 124 S.Ct. at p. 2535 [Washington sentencing scheme providing "illustrative" list of aggravating factors which justify

imposition of exceptional sentence]. However, California's Rules of Court make clear that in finding the existence of an aggravating factor, the court may *not* rely on a factor which is an element of the crime. Cal. Rules of Court, rule 4.420(d) ["A fact that is an element of the crime shall not be used to impose the upper term."]; *see also People v. Fernandez*, 226 Cal.App.3d 669, 680 (Cal.App. 1990) [trial court erroneously relied on vulnerability based on young age of victim as aggravating factor in sentencing resident child molester because age range was specified in underlying offense]. Similarly, even where an aggravating factor technically is not an element of the underlying crime, California courts may not rely on it where the factor is inherent in the crime. *See, e.g., People v. Young*, 146 Cal.App.3d 729, 734 (Cal.App. 1983) [trial court improperly relied on "extreme serious nature of the offense" to aggravate defendant's sentence for assault with a deadly weapon since this offense is "obvious[ly]" an extremely serious offense]. Consequently, under California's DSL, when a sentencing court finds the existence of factors in aggravation, it necessarily finds the existence of facts *beyond* which the jury found to exist in arriving at its verdict.

California Penal Code section 288.5 -- the provision under which Mr. Cunningham was convicted -- provides that one who commits continuous sexual abuse of a child "shall be punished by imprisonment in

the state prison for a term of 6, 12, or 16 years." Cal. Pen. Code § 288.5, subd. (a). In the absence of aggravating factors, a departure from the middle term sentence of 12 years to the upper term of 16 years is unauthorized under the DSL. Pen. Code § 1170, subd. (b); *see also* Cal. Rules of Court, rule 4.420(a). Thus, pursuant to *Apprendi* and *Blakely*, the middle term of 12 years is the "statutory maximum" sentence that a judge may impose for a section 288.5 conviction "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington, supra,* 124 S.Ct. at p. 2537. Nevertheless, without the benefit of additional jury fact-finding, the trial court in this case found the existence of six aggravating factors based on which it departed from the statutory maximum of 12 years, and sentenced Mr. Cunningham to the upper term of 16 years. Moreover, by operation of California Rules of Court, rule 4.420(b), the court necessarily based its factual findings on a preponderance of the evidence standard. The California Court of Appeal held that the trial court's imposition of the upper term under these circumstances did not

contravene *Blakely* or violate Mr. Cunningham's constitutional rights to a jury trial and due process. Opinion at 16-17.[3]

Despite the similarity between Washington state's sentencing scheme and California's DSL, the California Supreme Court has now concluded -- as the Court of Appeal did here -- that the DSL does not violate the dictates of *Apprendi* and *Blakely*. *People v. Black, supra,* 35 Cal.4th at p. 1254. In *Black*, the court conceded that "[t]he mandatory language of [California Penal Code] section 1170, subdivision (b), does provide some support for defendant's position," *ibid.*, and that "section 1170, subdivision (b) can be characterized as establishing the middle term sentence as a presumptive sentence . . ." *id.* at p. 1257. However, relying on *United States v. Booker, supra,* and the discretion sentencing judges have under the DSL to impose the lower, middle, or upper term after the jury has returned a guilty verdict, the court concluded that a

---

[3] According to the Court of Appeal, *United States v. Booker, supra,* 125 S.Ct. 738,

> "clarifies that *Blakely's* Sixth Amendment concerns are inapplicable to statutory provisions that merely *permit*, but do not compel, the imposition of a particular sentence upon a particular finding of fact. In California, Penal Code section 1170 permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors." Opinion at 17, n.14 (emphasis in original).

judge's imposition of "the upper term is the 'statutory maximum' for purposes of Sixth Amendment analysis." *Id.* at p. 1257-1258. Indeed, the court found that the DSL "preserves, rather than undermines, the traditional power of the jury." *Id.* at p. 1257.

In dissent, Justice Kennard observed: "Hard as it tries, the majority here cannot point to any significant differences between California's sentencing law and the Washington sentencing scheme that the high court invalidated in *Blakely* . . . ." *People v. Black, supra,* 35 Cal.4th at p. 1271 (conc. & dis. opn. of Kennard, J.). Moreover, as Justice Kennard explained, the judicial discretion afforded California sentencing judges under the DSL is in fact no different from the discretion afforded judges under the Washington scheme. *Ibid.*[4]

---

[4] Justice Kennard concluded that pursuant to this Court's precedents,

> "under California's sentencing scheme a trial court may use an aggravating fact to justify an upper term only if: (1) a jury has made a finding on the aggravating fact, (2) the defendant has admitted the aggravating fact, (3) the defendant has validly waived the right to a jury trial on the aggravating fact, or (4) the aggravating fact relates to the defendant's criminal record rather than to the circumstances of the conviction offense. Absent one of these situations, the trial court may not impose an upper term sentence." *People v. Black, supra,* 35 Cal.4th at p. 1265 (conc. & dis. opn. of Kennard, J.).

In light of California's position regarding the constitutionality of its DSL, certiorari is necessary to make California and its sentencing scheme adhere to constitutionally acceptable standards. More importantly, this Court should grant certiorari on the issue presented to prevent California from continuing every day to violate the constitutional rights of countless criminal defendants facing sentencing in its courts.

C. A Split Of Authority Has Developed In The State Courts Regarding The Application Of *Blakely* and *Booker* To Sentencing Schemes Like California's Determinate Sentencing Law.

Certiorari is also appropriate to resolve the stark split of authority which has developed in the state courts regarding the application of *Blakely* to sentencing schemes similar to California's DSL. Decisions from Arizona, Colorado, Minnesota, New Jersey, North Carolina, Indiana, and Oregon have applied a bright-line rule, holding that the Sixth and Fourteenth Amendments are necessarily violated when a sentencing judge finds facts in imposing a sentence longer than the maximum authorized by the jury's verdicts or the defendant's admissions. *See, e.g. State v. Brown*, 209 Ariz. 200, 203, 99 P.3d 15, 18 (Ariz. 2004); *Lopez v. State*, 113 P.3d 713, 723-725 (Colo. 2005); *Smylie v. State*, 823 N.E.2d 679, 863 (Ind. 2005); *State v. Shattuck*, 689 N.W.2d 785, 786 (Minn. 2004); *State v. Natale*, 184 N.J. 458, 466, 878

A.2d 724, 728 (N.J. 2005); *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 264-265 (N.C. 2005); *State v. Dilts*, 337 Or. 645, 649, 103 P.3d 95, 99 (Or. 2004). On the other hand, state courts in California, Hawaii, and Tennessee, finding no bright-line rule, have concluded that such fact-finding by judges is constitutional when conducted within a sentencing scheme characterized by broad judicial discretion. *See, e.g., People v. Black, supra,* 35 Cal.4th at p. 1254 (Cal.); *State v. Maugaotega,* 107 Haw. 399, 114 P.3d 905, 914-915 (Haw. 2005); *State v. Gomez,* 163 S.W.3d 632, 661 (Tenn. 2005). As discussed in the previous section, this is precisely the approach taken by the Court of Appeal in this case. *See* Opinion at 16-17.

Since this sharp split of authority has arisen among the state's highest courts, it cannot be resolved without this Court's intervention. Thus, in order to correct the constitutional analysis in those jurisdictions which, contrary to *Blakely*, uphold sentencing schemes permitting the imposition of enhanced sentences based on judicial fact-finding -- not jury findings or defendants' admissions -- the Court should grant this Petition for Writ of Certiorari.

D. This Case Presents An Excellent Vehicle For Considering The Question Presented.

At least three aspects of this case m ke it an excellent vehicle for deciding whether California's DSL, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments. First, the case is on direct review and Petitioner unambiguously presented the federal constitutional claim to the California Court of Appeal, which denied the claim on its merits. Petitioner similarly presented the claim to the California Supreme Court, which declined to review it. Consequently, there is no procedural impediment to this Court's considering the question presented.

Second, this case only involves the finding of aggravating factors based on conduct relating to the charged offense, and is therefore unencumbered by the complexity of the recidivist-related aggravating factors exception to the jury trial right identified in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In contrast, the California Supreme Court's decision in *People v. Black, supra,* involves this very issue. Indeed, although Justice Kennard dissented from the majority's reasoning in *Black* which upheld the constitutionality of California's DSL, she concurred in the result because "in sentencing defendant to the upper

term, the trial court relied in part on [defendant's] prior criminal history and on facts found by the jury . . . ." *People v. Black, supra,* 35 Cal.4th at p. 1273 (conc. & dis. opn. of Kennard, J.). Also unlike *Black*, this case does not involve the trial court's use of an aggravating factor that the jury found true in returning its verdict. *Ibid.* [probation ineligibility finding by jury].

Third, there is every reason to believe that the constitutional violation was not harmless. The trial court imposed the upper term of 16 years based on its finding of six factors in aggravation. At the sentencing hearing, defense counsel not only objected to, and contested the factors in aggravation, but he introduced substantial evidence supporting a finding that probation was the appropriate sentence for Mr. Cunningham. RT 716-722; *cf. United States v. Neder,* 527 U.S. 1, 19 (1999) [failure to submit an element of an offense to jury will not be harmless where defendant contested omitted element and raised evidence sufficient to support a contrary finding]. Further, the state court squarely rejected Petitioner's claim on the merits, without any finding of harmless error. Opinion at 16-17. Presiding Justice Jones, who in dissent concluded that the imposition of the upper term violated Petitioner's constitutional rights under *Blakely*, would have found the

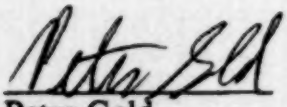
constitutional violation prejudicial and remanded for a resentencing. Conc. & dis. opn. of Jones, P.J. at 1-2. This Court should grant Mr. Cunningham's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

DATED: September 12, 2005.

Respectfully submitted,

By: 

Peter Gold
Attorney for petitioner
John Cunningham

APPENDIX A

Filed 4/18/05 P. v. Cunningham CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOHN CUNNINGHAM,** **Defendant and Appellant.**	**A103501** **(Contra Costa County Super. Ct. No. 010396-0)**

John Cunningham (appellant) appeals his conviction by jury trial of continuous sexual abuse of a child under age 14. (Pen. Code, § 288.5.)[1] On appeal he contends the trial court erroneously admitted the victim's hearsay statements, imposed the upper term, and based the upper term on aggravating factors not found by the jury in violation of his right to jury trial under *Blakely v. Washington* (2004) ___U.S.___ [124 S.Ct. 2531]. We reject these contentions and affirm.

BACKGROUND

Victim's Testimony

The victim, referred to at trial and herein as John Doe, is appellant's son. Doe, born in August 1989, testified that he lived with his mother, Wanda, for the first 10 years of his life. In December 1999, when Doe was 10 years old, he went to live with

[1] Appellant was sentenced to 16 years in state prison.

appellant, appellant's girlfriend, Latasha, appellant's and Latasha's baby, and Latasha's young nephew.

Doe admitted that prior to moving in with appellant, Doe falsely accused his stepfather of beating him, resulting in scars on his back, because he wanted to live with appellant and did not like his new stepfather. After appellant took Doe to the hospital Doe admitted he had lied. Doe also admitted that when he was eight years old he called the telephone number for Boys' Town and falsely reported that there was no food in his mother's house and she did not provide him with enough attention. The police and child protective services investigated the call and found Doe was healthy and had ample food at his house.

Doe testified that in January 2000, shortly after he moved in with appellant, appellant began forcibly sodomizing him and forcing him to orally copulate appellant. Sometimes while being sodomized by appellant, Doe screamed for help because it hurt "very bad" and appellant put his hand over Doe's mouth to stop Doe from screaming. The acts occurred in appellant's bedroom, the living room, the bathroom and the shower. Sometimes appellant molested Doe when he was angry with Doe. Because appellant threatened to kill Doe if he told anyone about the abuse, Doe was afraid of appellant and did not tell anyone while living with him. In December 2000, Doe first told his younger cousin, Brittany, about appellant's abuse in a note while visiting her when appellant was out of town. Before giving her the note Doe said "I have to tell you," but did not want to say it aloud. The note said, "my dad is hu[m]ping me." Thereafter Brittany showed the note to her mother, Karla, who then questioned Doe as to what it meant. Doe told Karla about appellant's repeated incidents of sodomy and forcing Doe to orally copulate him. After Karla told her husband, Gerrell, about Doe's allegations, Gerrell talked to Doe, then took him to appellant's house for a family meeting. While there, as Doe was packing his clothes, appellant confronted him while they were alone and said, "In a week you better say you are lying or else I am going to fuck you up."

After Doe reported appellant's abuse to Wanda and his stepfather, Wanda took him to the hospital. The pediatrician who performed a sexual assault examination on Doe

testified that the examination revealed no trauma to Doe's anus, consistent with most postsodomy examinations. However, the doctor said that Doe's accounts of how he felt physically during and after being sodomized and orally copulating appellant were consistent with how children report such incidents.

On January 4, 2001, Doe was interviewed by San Pablo Police Officer Jeff Palmieri. Doe told Palmieri that appellant sexually abused him numerous times beginning shortly after he moved in with appellant. On January 8, Kerry O'Malley of the Children's Interview Center (CIC) conducted a videotaped sexual assault interview of Doe.[2] Doe's statements during the CIC interview were consistent with his earlier statements to Palmieri.

On January 5, 2001, appellant agreed to a videotaped interview by Officer Palmieri and Contra Costa District Attorney's Office Inspector Ted Todd.[3] At the beginning of the interview appellant adamantly denied any type of sexual touching of Doe. As the questioning ensued, appellant became more forthcoming in his responses. After two or three hours, appellant admitted that Doe's mouth did make contact with appellant's penis for five seconds while in the shower on one occasion. Appellant also said that Doe was a liar and was manipulative and later said Doe was a homosexual and "can't quit the homosexual behavior."

Defense

Testifying in his own defense, appellant denied ever molesting Doe or any child. He also denied ever threatening to kill Doe or "fuck [him] up." Appellant testified that prior to coming to live with him, Doe had been expelled from school due to behavior problems and was not doing his homework. Other defense witnesses testified that Doe had a history of lying and his allegations against appellant were fabricated because he was unhappy about appellant's requirements regarding chores and homework.

---

2 A videotape of the CIC interview was played for the jury and admitted into evidence.

3 The videotaped interview was played for the jury.

DISCUSSION

I. *Doe's Hearsay Statements Were Properly Admitted*

Appellant contends the court erred in admitting, pursuant to Evidence Code section 1360 (hereafter section 1360), the portions of the videotaped CIC interview which contained Doe's hearsay statements to Brittany and Karla. He contends the error violated his right to due process. Appellant does not argue that the admission of Doe's hearsay statements violated the Sixth Amendment right of confrontation under the rule recently announced in *Crawford v. Washington* (2004) 541 U.S. 36. Since Doe testified at trial, no Confrontation Clause violation occurred. (*Crawford*, pp. 68-69.)

Section 1360[4] creates a limited exception to the hearsay rule in criminal prosecutions regarding a child's statements describing acts of child abuse or neglect, including sexual abuse. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.) In determining whether child hearsay statements possess the requisite indicia of reliability

---

[4] Section 1360 provides, in relevant part:

"(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

"(1) The statement is not otherwise admissible by statute or court rule.

"(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

"(3) The child either:

"(A) Testifies at the proceedings.

"(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.

"(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

"(c) For purposes of this section 'child abuse' means an act proscribed by Section . . . 288.5 of the Penal Code . . . ."

pursuant to section 1360, subdivision (a)(2), the trial court may consider such nonexclusive factors as: "(1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected from a child of [similar] age; and (4) lack of motive to fabricate. [Citation.]" (*People v. Eccleston* (2001) 89 Cal.App.4th 436, 445; *People v. Brodit* (1998) 61 Cal App.4th 1312, 1330, citing *In re Cindy L.* (1997) 17 Cal.4th 15, 29-30.) Although courts have considerable leeway in their consideration of appropriate factors, the " 'unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.' [Citation.]" (*Roberto V.*, at p. 1374.)

Appellant relies on *Lilly v. Virginia* (1999) 527 U.S. 116 and *People v. Eccleston, supra,* 89 Cal.App.4th 436 to argue we are to exercise de novo review over the trial court's reliability determination. This argument rests on a misunderstanding of the cited authorities. At the time section 1360 was enacted (1995), the leading case on the interpretation of the Confrontation Clause was *Ohio v. Roberts* (1980) 448 U.S. 56.[5] *Roberts* had held that the prosecution could only introduce hearsay against a criminal defendant if the statement was admitted under a firmly rooted hearsay exception or had sufficient indicia of reliability. (*Id.* at p. 66.) Since section 1360 is not a firmly rooted hearsay exception, an accused could argue under *Roberts* that a statement admitted under this section lacked the reliability required by the statute and by the Constitution. While the deferential abuse of discretion standard of review is applied to the statutory finding (*People v. Roberto V., supra,* 93 Cal.App.4th at p. 1367; *People v. Brodit, supra,* 61 Cal.App.4th at pp. 1329-1330), the stricter de novo standard of review is applied to the reliability finding under the Confrontation Clause (*Lilly*, at pp. 136-137; *Eccleston*, at pp. 445-446). Since only the statutory finding of reliability is at issue here, we apply the abuse of discretion standard. In doing so we review the trial court's ruling based on the evidence before the court at the time of the ruling. (See, e.g., *People v. Box* (2000) 23 Cal.4th 1153, 1195; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 176.)

---

[5] During the pendency of this appeal, the United States Supreme Court rejected the *Roberts* analysis in *Crawford v. Washington, supra,* 541 U.S. 36.

In this case, prior to trial, appellant filed a written motion in limine seeking to exclude portions of Doe's videotaped CIC interview on the basis that they did not qualify under section 1360. At the initial hearing appellant also objected to admission of Doe's incriminating statements to Brittany and other adult relatives prior to the videotaped interview.[6] The parties stipulated that the court would review the CIC interview video and sections of the police reports submitted by the prosecutor, which describe the subject statements by Doe to determine whether the statements provided sufficient indicia of reliability to be admitted under section 1360. Thereafter the court reviewed the CIC interview videotape, a transcript thereof, a police report, and a supplemental police report,[7] after which it ruled Doe's hearsay statements admissible.

A. *The Police Reports*

1. *Initial Report*

Officer Palmieri's initial report states that in his January 4, 2001 interview, Doe said that during the first molestation incident appellant made Doe touch appellant's penis and then "whipped" Doe on the buttocks with his hand for not doing his homework. Throughout the year 2000, appellant made Doe orally copulate him in the living room of the residence and appellant sodomized Doe several times while in the bathroom. Doe referred to appellant's penis as his "dingling" or "dick," and said appellant used Vaseline or oil before sodomizing him. Doe said that in December 2000 he "got in trouble by [appellant]" regarding a book report after which appellant whipped him on his buttock and had him orally copulate appellant. Two weeks before Christmas appellant sodomized him in the shower causing him great pain. Doe described having to use the bathroom after being sodomized and seeing a white film in the toilet water. He said the oral copulation and sodomy happened almost every day that he was alone with appellant.

---

[6] We note that appellant's objection failed to specify which adult relatives were referred to. However, the relatives were identified in the police reports and the CIC videotape the court considered in ruling on the motion.

[7] The police reports and transcript of the CIC interview were introduced solely for purposes of the section 1360 motion, and were not admitted into evidence.

He admitted lying several times to his parents, but was adamant that his accusations regarding appellant were not lies, and he was visibly upset. When Palmieri asked why Doe was crying, he said he did not want to get anyone in trouble, loved appellant and wanted appellant to stop molesting him. Doe told Palmieri that on January 2, 2001, he looked Brittany in the eyes and told her appellant was molesting him. After Brittany told Karla, Karla confronted Doe and he told her about appellant's abuse over the last year. Doe also told Palmieri that when Karla took him back to appellant's house to confront appellant with Doe's allegations, appellant, while alone with Doe told Doe that if he did not say the allegations were a joke, he would "fuck him up." Doe also told Palmieri he did not tell anyone about the abuse for a long time because appellant threatened to kill him if he told anyone.

2. *Supplemental Report*

Officer Palmieri's supplemental report states that on January 9, 2001, he telephoned Karla and Brittany. Brittany told him that on the afternoon of January 2 while she and Doe were drawing, Doe told her he had something important to tell her but did not want to say it out loud. Doe wrote down that appellant had been "humping" him. When Brittany asked Doe if he was telling the truth, he looked her in the eyes and responded affirmatively. Brittany believed Doe was telling the truth because before he wrote the note he was "happy," and when he told her about appellant he started crying. Karla told Palmieri that after Brittany gave her Doe's note she confronted Doe and told him she wanted him to tell the truth. Doe told Karla that appellant had been "putting his dingling in [Doe's] butt," and Doe was also made to put his mouth on appellant's penis. Doe told her the incidents had been occurring for a year, often in the shower, and that appellant put Vaseline or grease "on his butt" before each act of sodomy. Doe told her the last act happened a couple of weeks before because he had not completed a book report.

B. *The CIC Videotape*

When interviewer O'Malley asked Doe if he knew why he was at CIC, Doe responded "so [he] could talk to [her]" "about something that happened to [him]." In

response to O'Malley's saying, "Well if you feel comfortable right now, [Doe], could you tell me what happened," Doe gave a detailed description of the molestation he suffered for a year by a "person" or "him." Doe described appellant's use of Vaseline and the pain he experienced while being sodomized. His description of the first incident of molestation was consistent with Palmieri's police report. Subsequently, when O'Malley asked who "him" referred to, Doe identified appellant. Doe said appellant "humped" him, which Doe said meant "molested." The conduct Doe described as appellant "humping" him constituted sodomy. Doe often referred to appellant's penis as his "private part," but also referred it as his "ding-a-ling" and his "dick." He referred to having to go to the bathroom after being sodomized as "when I boo-boo." He also said after being sodomized something "white with bubbles" would come out in his stool. Doe described the December book report incident as the last incident of molestation. He said appellant first "whooped him" in the bedroom with a belt, then took him to the living room and had Doe orally copulate him, then took Doe into the bathroom and sodomized him. Doe said he told Brittany because he knew she would tell her mother.

When O'Malley asked Doe how he felt about what happened with appellant, Doe said he felt "shock." Doe said appellant threatened to kill him if he told anyone. Doe said he was afraid to tell anyone because they might not believe him. However, he said he "got tired of him doing it" and "it was disgusting" and told his cousin Brittany to tell her mother. He said he was glad he "brought it out" because he "got sick of it." He said the molestation happened almost every day.

Doe admitted to O'Malley that in the past he had "said some stuff" about his mother that was not true. When O'Malley asked how she would know if he was telling her the truth, Doe said people know when he is telling the truth. He said Brittany knew he was telling the truth because he looked in her eyes in response to her request to do so and she knew he was telling the truth. He also said he was not laughing when he told Brittany, and that kids laugh when they are not telling the truth. Doe said he cried when talking to Officer Palmieri because he was afraid that Palmieri would not believe him. He was afraid no one would believe him because of his prior lies about his mother and

stepfather. He said he previously lied about his mother because he was left alone with no one to talk to and play with. He said he lied about his stepfather because his stepfather would play with his sisters but not with him.

C. *Court's Reasoning Regarding Reliability*

At the subsequent hearing on the in limine motion the court ruled Doe's out-of-court statements admissible, stating the following reasons for concluding that they bore sufficient indicia of reliability: "In terms of reliability, the court finds that the spontaneity of the statements by the minor to his cousin Brittany in the note, knowing his cousin would tell his aunt, and consistent repetition of the manner in which the acts were committed shows the reliability of such statements. [¶] The mental state of the minor is demonstrated by the fact that he came forward because he said he was tired of the abuse. The use of the terminology . . . in which he described the acts is unexpected in a child of similar age. [¶] And to further explain the court's finding . . . the court has read his description of the sexual acts which showed a knowledge of such matters far beyond the ordinary familiarity of a child of his age. [¶] And fourth, the lack of motive to fabricate is demonstrated by the fact that he was very sorry that he had to tell about these acts because they involved his father and he did not want to have to describe them. [¶] So, based upon those factors the court finds under *Brodit* and *Eccleston* and [section] 1360 that the requirements have been met."

For the following reasons, appellant contends the court erroneously concluded that Doe's hearsay statements were sufficiently reliable to be admissible under section 1360: First, the statements, particularly the note to Brittany, were not spontaneous, but were instead planned. In addition, the statements were not consistent, but were "embellished" and "refined" with each retelling. Second, Doe's mental state at the time of his statements was "unstable" given his prior false accusations against Wanda and Latasha; his animosity toward appellant, Wanda and Latasha; and his behavioral problems at school. Third, Doe's statements did not indicate a level of knowledge that was unexpected for an 11 and one-half year old, and he spent time with older siblings and had access to numerous TV channels with no parental controls. Fourth, Doe had a motive to

lie—he wanted to move back to Wanda's house due to his perceived mistreatment by appellant and Latasha. Finally, there was little, if any, evidence corroborating Doe's accusations.

We conclude the court did not abuse its discretion in finding Doe's hearsay statements reliable. Regarding the spontaneity of the statements to both Brittany and O'Malley, Doe's statements were spontaneous in the sense that Doe initiated them. (See *People v. Eccleston, supra,* 89 Cal.App.4th at p. 446.) In addition, his statements to O'Malley regarding appellant's abuse were in response to her neutral question, "could you tell me what happened?" We reject appellant's assertion that Doe's hearsay statements were not consistently repeated, but were "embellished" and "refined" with each retelling. Doe's initial and very brief statement to Brittany that appellant had been sodomizing him was not inconsistent with his much longer statements to Karla and O'Malley. Doe's statements to Karla and O'Malley were remarkably consistent as to the "general outline of abuse" (*id.* at p. 446), and it is understandable that he imparted extra details of the abuse to the interviewer because of the interview format.

Regarding Doe's mental state, the record is mixed. Although he conceded to O'Malley that he had previously fabricated claims against his mother and stepfather, O'Malley conducted a lengthy colloquy with him regarding truth and falsity and questioned him as to how she would know that he was telling the truth. He also stated that in light of his prior lies he was worried that his allegation of appellant's abuse would not be believed. The court could reasonably conclude that this degree of candor enhanced, rather than detracted from Doe's reliability.

We also reject appellant's assertion that Doe's statements did not indicate a level of knowledge unexpected of an 11 and one-half year old. Doe's extremely detailed descriptions of the unpleasant physical sensations he experienced during and after being sodomized would be unusual even for an adult unless experienced firsthand. Nothing in the record before the court at the in limine hearing suggested that Doe's level of knowledge came from a source other than his personal experience.

Based on the record before the court at the in limine hearing, it could properly determine that Doe lacked a motive to fabricate based on his stated love for appellant, reluctance to report the abuse and the possibility of appellant's resulting incarceration. Appellant had the opportunity to cross-examine Doe at trial about his perceived mistreatment by appellant and appellant's girlfriend as a motive for fabricating the abuse allegations.

Finally, we reject appellant's assertion that the lack of corroborating evidence suggested that Doe's hearsay statements were unreliable. Corroboration is not necessary where the child victim testifies at trial. (See § 1360, subd. (a)(3)(A).)

After reviewing the police reports and CIC videotape, the court provided a thorough statement of its reasons for finding Doe's hearsay statements reliable. Appellant has failed to demonstrate that the court abused its discretion.

II. *The Court Properly Imposed the Upper Term*

A. *Aggravating Factors*

Appellant next contends the court erroneously relied on five of six aggravating factors in sentencing him to the upper term.[8]

Prior to sentencing, the court appointed psychologist Richard Lundeen, pursuant to Penal Code section 288.1, to examine appellant and submit to the court a written report and recommendation.[9] Dr. Lundeen opined that appellant would not be a danger to Doe or other children in the community if released. Regarding treatment, Dr. Lundeen stated " 'either [appellant] did not engage in inappropriate sexual behavior as charged, or else he has repressed those behaviors to a depth where he cannot deal with them at a conscious level at this time. In either case, he would be a poor candidate for

---

[8] The People assert that appellant has waived this claim because he only objected below to the aggravating factors that the victim was particularly vulnerable and that appellant took advantage of a position of trust. (See *People v. Scott* (1994) 9 Cal.4th 331, 356.) Even assuming the claim is waived, we review it on the merits in the interests of justice and to prevent an ineffective assistance of counsel claim.

[9] Dr. Lundeen's report is not included within the appellate record but is summarized in the probation report.

rehabilitative therapy if he does not have a condition from which he is trying to rehabilitate." Appellant retained psychologist John Kincaid to conduct a psychological evaluation. Dr. Kincaid's report stated that if granted probation appellant would be unlikely to pose a risk to Doe, but it would be prudent to restrict him from direct contact with minors without the immediate presence of a responsible adult. Dr. Kincaid also stated that he saw "little likelihood that [appellant's] incarceration would be a detriment to [Doe], who had lived with him only a relatively brief time." Dr. Kincaid recommended that appellant obtain treatment which would decrease the likelihood that he would reoffend. He also stated that, if incarcerated, appellant should be referred for a mental health evaluation although "offense-specific treatments are almost nonexistent in custody."

Although the probation report did not recommend a particular sentence, it noted the following circumstances in aggravation (Cal. Rules of Court,[10] rule 4.421): (1) "The crime involved great sexual violence and callousness toward a 10-year-old child." In particular, the report noted that the victim was "brutally whipped and sodomized over 100 times in a one year period." (2) The victim was particularly vulnerable as he relied on his father, as his custodial parent, for support. (3) Appellant took advantage of his position of parental trust and trust as a police officer to commit the offense. (4) Appellant engaged in violent conduct which indicated a serious danger to children in society. The probation report noted the single mitigating factor that appellant had no prior criminal record. (Rule 4.423)

At sentencing, the court acknowledged that it had considered the probation report, psychological evaluations, sentencing memoranda, letters from the community in mitigation and letters from Doe and his mother. After denying probation, it found the sole mitigating factor was appellant's lack of prior criminal conduct. (Rule 4.423(b).) The court found the following aggravating factors: (1) The crime involved great violence and the threat of great bodily harm disclosing a high degree of viciousness and

---

[10] All rule references are to the California Rules of Court.

callousness. (2) The victim was particularly vulnerable due to his age and dependence on appellant as his father and primary caretaker. (3) Appellant threatened to commit bodily injury upon the victim in an attempt to coerce the victim to recant his statements about the crime. (4) Appellant took advantage of a position of trust to commit the crime in that he is the victim's father and sole caregiver for a substantial period of time. (5) Appellant engaged in violent conduct which indicates a serious danger to the community. (6) Appellant was a peace officer at the time he committed the criminal acts, violating his duty to serve the community of which the victim was a member. After finding that the aggravating circumstances outweighed the sole mitigating factor, the court imposed the upper 16-year term.

1. *The Relationship Between Appellant and the Victim*

Appellant contends the court erred in finding the victim was vulnerable due to his age because age was an element of the charged offense. (Rule 4.420(d).) Although the victim's minority cannot be used as an aggravating factor where minority is an element of the offense (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615, disapproved on other grounds in *People v. Scott, supra,* 9 Cal.4th at p. 353, fn. 16), victim vulnerability in this case was also based on the victim's dependence on appellant as his primary caretaker. Thus, the court properly based its vulnerable victim finding on a factor other than the victim's age. (*People v. Garcia* (1985) 166 Cal.App.3d 1056, 1070.)

Appellant next contends the court erred in using the victim's dependence on appellant, and appellant's taking advantage of a position of trust as the victim's father/sole caregiver as two separate aggravating factors. He relies on *Garcia,* which held that the victim's relationship to the defendant could not be used both to support a finding of vulnerability and to find that the defendant took advantage of a position of trust or confidence to commit the offense. "It does appear that these factors are two sides of the same coin. The significant circumstance is the relationship between the defendant and the victim. The circumstances that placed the defendant in a position of trust and confidence were identical to the circumstances which placed the victim in a position of vulnerability." (*People v. Garcia, supra,* 166 Cal.App.3d at p. 1070.) We agree with this

analysis and conclude that having used the relationship between appellant and the victim in support of the vulnerable victim factor (rule 4.421(a)(3)), the court could not use that fact in support of a separate aggravating factor (rule 4.421(a)(11)).

2. *Danger to Society*

Appellant next contends the court's finding that he engaged in violent conduct, which indicated he posed a serious danger to the community (rule 4.421(b)(1)), is not supported by the evidence. We disagree. The fact that appellant repeatedly forcibly sodomized Doe and forced Doe to orally copulate him suggests that the charged offense was a crime of violence. In addition, appellant's retained psychologist, Dr. Kincaid, opined that while a grant of probation would not pose a risk to Doe, it would be prudent to restrict appellant from unsupervised direct contact with minors. In addition, Dr. Kincaid recommended that appellant receive treatment to reduce the likelihood of reoffending. Dr. Kincaid's testimony provides sufficient support for the finding that appellant posed a serious danger to the community.

3. *Great Violence and Great Bodily Harm*

Appellant argues the court erred in using the fact that he threatened the victim both to find that the crime involved great violence and the threat of great bodily harm (rule 4.421(a)(1)) and to find that he threatened the victim in an attempt to coerce the victim to recant the victim's statement about the crime (rule 4.421(a)(6)). Appellant asserts the record is devoid of any violence separate from that deemed to be inherent in the acts of sodomy and oral copulation.

Even assuming the court's reliance on this factor was misplaced, the court properly found multiple aggravating factors. Sentencing courts have wide discretion in weighing aggravating and mitigating factors, and may balance them qualitatively as well as quantitatively. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) In addition, one aggravating factor alone may warrant imposition of the upper term and the court need not state reasons for minimizing or disregarding mitigating circumstances. (*Ibid.*; accord, *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043-1044.)

4. *Status As Peace Officer*

Finally, appellant contends his status as a police officer was not reasonably related to his sentencing and therefore the court erroneously relied upon it as an aggravating circumstance under rule 4.408(a).[11] In particular, he argues that the abuse he inflicted on the victim was in no way related to his employment as a police officer. Moreover, he argues that his status as a police officer did not make the offense against the victim "distinctively worse than it would ordinarily have been." (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 682.)

Appellant also notes that this case is factually distinguishable from *Brown*, where the defendant's status as a police officer was relied on as an aggravating factor in imposing the upper term on a firearm enhancement. In that case, the defendant shot a fellow officer with whom she was having an affair, and thereafter destroyed evidence. *Brown* stated that the trial court could properly have considered the unusual facts relating to the defendant—that the defendant was a police officer who used deadly force to solve a personal problem, caused serious injury, and thereafter destroyed evidence as an aggravating factor because peace officers are seen as having a duty to protect people, not unlawfully shoot an unarmed estranged lover. (*People v. Brown, supra,* 83 Cal.App.4th at pp. 1043-1044.) We agree with appellant that *Brown* is distinguishable from the instant case.

Again, assuming the court improperly relied on appellant's police officer status as an aggravating factor, the court properly found two aggravating factors and exercised its discretion in balancing them against a single mitigating factor. Appellant has failed to demonstrate that imposition of the upper term was an abuse of the court's discretion.

---

[11] Rule 4.408(a) provides: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge."

B. *Blakely v. Washington*

In a supplemental brief filed pursuant to *Blakely v. Washington, supra*, 124 S.Ct. 2531, appellant contends his sentence must be reversed because in imposing the upper term the trial court, and not the jury, made the findings on aggravating factors in violation of his rights to jury trial and due process.[12] The People rejoin, in part, that appellant waived his challenge.[13]

Under the California sentencing scheme the lower, middle and upper terms constitute a range of authorized punishments for a given crime; the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment. A defendant, such as appellant, who is convicted of continuous sexual abuse of a child under age 14, faces a maximum prison term of 16 years in prison that may be imposed "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2537.) As *Blakely* explained, "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid.*) It is instructive that, in distinguishing between permissible and impermissible schemes, the court in *Blakely* explained: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-

---

[12] The issue of whether *Blakely* precludes a trial court from making findings on aggravating factors in support of imposing an upper term sentence is currently pending in our Supreme Court. (*People v. Towne,* review granted July 14, 2004, S125677.)

[13] The California Supreme Court is currently considering the issue in *People v. Black*, review granted July 28, 2004, S126182.

year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury." (*Blakely*, at p. 2540.) Here, the 16-year upper term was the maximum statutorily authorized sentence for violating Penal Code section 288.5. The court's imposition of that maximum did not violate appellant's rights to jury trial or due process.[14]

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

STEVENS, J.

[14] After submission of this case, the United Supreme Court decided *United States v. Booker* (2005) __U.S.__ [125 S.Ct. 738] (maj. opn. of Stevens, J.).) *Booker*, in our view, clarifies that *Blakely's* Sixth Amendment concerns are inapplicable to statutory provisions that merely *permit*, but do not compel, the imposition of a particular sentence upon a particular finding of fact. In California, Penal Code section 1170 permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors. (See *People v. Scott, supra,* 9 Cal.4th at pp. 349-350.)

Jones, P.J., Concurring and Dissenting

I concur with the majority opinion in all respects, except its conclusion that imposition of the 16-year upper term was not unconstitutional. I conclude the case must be remanded for resentencing under compulsion of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*), for the reasons expressed in my dissent in *People v. Picado*, review granted January 19, 2005, S129826, California Rules of Court, rule 28.2(d)(2).

In short, *Blakely* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (*Blakely, supra*, 124 S.Ct. at p. 2538.) It explained that the relevant "statutory maximum" is not the maximum sentence a court may impose after finding additional facts, but the maximum it may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. (*Id.* at pp. 2537-2538.) Under California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).)

In this case, the trial court relied on a number of aggravating factors as the basis for imposing the upper term. Even if the vulnerable victim factor was based on evidence other than the victim's age, I believe that *Blakely* requires a jury finding of this factor. Similarly, the factors that appellant engaged in violent conduct indicating a serious danger to the community, and the crime involved great violence and the threat of bodily harm require a jury finding under *Blakely*. Finally, even assuming the evidence shows that appellant admitted his status as a police officer, I need not reach the question whether this is unrelated to the offense, as appellant contends, because I would remand the case to the trial court to weigh whether this factor alone is sufficient to support the upper term.

United States v. Booker (2005) ___ U.S. ___ [125 S.Ct. 738] (*Booker*), addressing the applicability of *Blakely* to the federal sentencing guidelines, does not alter my conclusion. Justice Breyer's majority opinion severed from the Federal Sentencing Act

its provision (18 U.S.C.A. § 3553(b)(1)) that makes the guidelines mandatory. As a result, the guidelines are now effectively advisory; their use will not implicate the Sixth Amendment, leaving a federal court broad discretion to impose a sentence within the statutory range assigned to a particular offense. (*Booker, supra,* 125 S.Ct. at pp. 750, 757, 764.) By the mandatory language of Penal Code section 1170, subdivision (b), a California court is required to impose the middle term, unless it makes factual findings different from, or in addition to, those inherent in the jury verdict.[1]

Jones, P.J.

[1] Penal Code section 1170, subdivision (b), states: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime." (Italics added.)

APPENDIX B

Filed 5/4/05 P. v. Cunningham CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN CUNNINGHAM,

Defendant and Appellant.

A103501

(Contra Costa County Super. Ct. No. 010396-0)

ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 18, 2005, be modified as follows:

At the end of the last paragraph on page 15, after the sentence ending "upper term was an abuse of the court's discretion," add the following sentence:

> Remand for resentencing is unnecessary since it is not reasonably probable that the court would have imposed a lesser term had it know that some of its reasons were improper. (See *People v. Price* (1991) 1 Cal.4th 324, 492.)

There is no change in the judgment.

Respondent's petition for rehearing is denied. Jones, P.J., would grant rehearing.

Dated:_____ _____, P.J.

APPENDIX C

Court of Appeal, First Appellate District, Division Five - No. A103501
S133971

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOHN CUNNINGHAM, Defendant and Appellant.

Petition for review denied without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black* (June 20, 2005, S126182) __ Cal.4th __, 2005 WL 1421815 <http://www.courtinfo.ca.gov/opinions/documents/S126182.PDF> regarding the effect of *Blakely v. Washington* (2004) 542 U.S. __, 124 S.Ct. 2531, and *United States v. Booker* (2005) 543 U.S. __, 125 S.Ct. 738, on California law.

Brown, J., was absent and did not participate.

SUPREME COURT
FILED
JUN 29 2005
Frederick K. Ohlrich Clerk
DEPUTY

Chief Justice

APPENDIX D

Rule 4.401. Authority

The rules in this division are adopted pursuant to Penal Code section 1170.3 and pursuant to the authority granted to the Judicial Council by the Constitution, article VI, section 6, to adopt rules for court administration, practice and procedure.

Rule 4.405. Definitions

As used in this division, unless the context otherwise requires:

* * *

(b) "Base term" is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed.

(c) "Enhancement" means an additional term of imprisonment added to the base term.

(d) "Aggravation" or "circumstances in aggravation" means facts which justify the imposition of the upper prison term referred to in section 1170(b).

(e) "Mitigation" or "circumstances in mitigation" means facts which justify the imposition of the lower of three authorized prison terms or facts which justify the court in striking the additional punishment for an enhancement when the court has discretion to do so.

(f) "Sentence choice" means the selection of any disposition of the case which does not amount to a dismissal, acquittal, or grant of a new trial.

* * *

(h) "Imprisonment" means confinement in a state prison.

* * *

Rule 4.406. Reasons

(a) [How given] If the sentencing judge is required to give reasons for a sentence choice, the judge shall state in simple language the primary factor or factors that support the exercise of discretion or, if applicable, state that the judge has no discretion. The statement need not be in the language of these rules. It shall be delivered orally on the record.

(b) [When reasons required] Sentence choices that generally require a statement of a reason include:

* * *

(2) Imposing a prison sentence and thereby denying probation.

* * *

(4) Selecting a term other than the middle statutory term for either an offense or an enhancement.

* * *

(7) Striking the punishment for an enhancement.

* * *

(10) Striking an enhancement or prior conviction allegation under section 1385(a).

Rule 4.408. Criteria not exclusive; sequence not significant

(a) The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.

(b) The order in which criteria are listed does not indicate their relative weight or importance.

Rule 4.409. Consideration of criteria

Relevant criteria enumerated in these rules shall be considered by the sentencing judge, and shall be deemed to have been considered unless the record affirmatively reflects otherwise.

Rule 4.420. Selection of base term of imprisonment

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate

facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

Rule 4.421. Circumstances in aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.

05-6551 ORIGINAL

CERTIFICATE OF SERVICE

I, Peter Gold, am over 18 years of age. My business address is 2269 Chestnut Street, #124, San Francisco, California, 94123. I am not a party to this action.

On September 16, 2005, I served the within

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

upon the parties named below by depositing a true copy in a United States mailbox in Libertyville, Illinois, in a sealed envelope, postage prepaid, and addressed as follows:

Supreme Court, U.S.
FILED
SEP 17 2005
OFFICE OF THE CLERK

Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

First District Appellate Project
730 Harrison Street, Suite 201
San Francisco, CA 94107

Clerk of the Court
Court of Appeal
First District, Division Five
350 McAllister Street
San Francisco, CA 94102

John Cunningham
(retained for appellant)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 16, 2005.

Peter Gold

BEST AVAILABLE COPY

RESPONSE REQUESTED

ORIGINAL

No. 05-6551

Supreme Court U.S
FILED
DEC 12 2005
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JOHN CUNNINGHAM,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FIVE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

MANUEL MEDEIROS
State Solicitor General

DONALD E. DE NICOLA
Deputy Solicitor General

GERALD A. ENGLER
Senior Assistant Attorney General

STAN HELFMAN
Supervising Deputy Attorney General

JEFFREY M. LAURENCE
Deputy Attorney General
*Counsel of Record

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5897
Fax: (415) 703-1234

Counsel for Respondent

QUESTION PRESENTED

Does California's determinate sentencing law comply with *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 125 S. Ct. 738 (2005), given *People v. Black*, 35 Cal. 4th 1238, 1257-58, 113 P.3d 534, 545, 29 Cal. Rptr. 3d 740, 753 (2005), which held the requirement that the trial court find at least one aggravating factor before imposing an upper term was only a requirement that the sentence be reasonable based on factfinding validly part of the sentencing process?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	3
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
Cases	
Apprendi v. New Jersey 530 U.S. 466 (2000)	3-5
Blakely v. Washington 542 U.S. 296 (2004)	2-5, 7, 8, 11-13
Garner v. Louisiana 368 U.S. 157 (1961)	10
People v. Black 35 Cal. 4th 1238 113 P.3d 534 29 Cal. Rptr. 3d 740 (2005)	2, 3, 6-11
State v. Lopez 2005-NMSC-036, ¶ 55, 2005 WL 3046661, at *17 __ P.3d __, (N.M. 2005)	12
United States v. Booker 125 S. Ct. 738 (2005)	2, 5, 6, 11-13
Wainwright v. Goode 464 U.S. 78 (1983)	10
Constitutional Provisions	
United States Constitution Sixth Amendment	2, 4-6, 11, 13
Statutes	
California Penal Code § 288.5 § 1170(b) § 1170.3	1, 7 7, 8, 10 7

TABLE OF AUTHORITIES (continued)

	Page
Court Rules	
California Rules of Court	
Rule 4.408(a)	10
Rule 4.420(b)	7, 8
Rule 4.420(c)-(d)	8
Rule 4.420(e)	8
Rules of the Supreme Court of the United States	
Rule 10	12
Rule 10(b)	12

IN THE SUPREME COURT OF THE UNITED STATES

No. 05-6551

JOHN CUNNINGHAM,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

STATEMENT OF THE CASE

1. On May 30, 2003, a jury found petitioner John Cunningham guilty of continuous sexual abuse of a child under the age of 14. Pet. App. A. at 1; Cal. Penal Code § 288.5. The offense is punishable by a term of imprisonment of six, twelve, or sixteen years, and the trial court selected the upper term of sixteen years. Pet. App. A. at 13.

The trial court identified six aggravating factors, of which the following five were affirmed by the California Court of Appeal: (1) The crime involved great violence and a threat of great bodily harm, disclosing a high degree of viciousness and callousness; (2) the victim was particularly vulnerable due to dependence on petitioner as his father and primary caretaker; (3) petitioner threatened to inflict bodily injury upon the victim in an attempt to coerce the victim to recant

his statements about the crime; (4) petitioner's violent conduct indicated a serious danger to the community; and (5) petitioner was a peace officer at the time he committed the criminal acts, violating his duty to serve the community of which the victim was a member. Pet. App. A at 12. The trial court found one mitigating factor, petitioner's lack of prior criminal conduct. Pet. App. A at 12-13.

2. On appeal, petitioner claimed his upper-term sentence violated the Sixth Amendment as construed in *Blakely v. Washington*, 542 U.S. 296 (2004). The California Court of Appeal rejected petitioner's claim, finding that California's determinate sentencing law does not violate *Blakely*. Pet. App. A. The California Supreme Court denied review "without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black*[, 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740 (2005)] regarding the effect of *Blakely v. Washington* (2004) 542 U.S. [296], and *United States v. Booker* (2005)[125 S. Ct. 738], on California law." Pet. App. C.

ARGUMENT

1. Petitioner contends that, because California's determinate sentencing law identifies the midterm as the presumptive sentence and allows the trial court to impose an upper-term sentence based on aggravating circumstances not found true by a jury, the law violates the Sixth Amendment as construed in *Blakely*. Petitioner ignores the California Supreme Court's construction of California's determinate sentencing law in *Black*, which demonstrated that our statute conforms to *Blakely*'s constitutional requirements. Because California's determinate sentencing law, as elucidated by the California Supreme Court, complies with *Blakely*'s constitutional requirements, certiorari is not appropriate. *See* Sup. Ct. R. 10.

a. *Blakely* explained "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303-04 (citations omitted); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000). Consequently, this Court held that any factual finding that permits a judge to increase a defendant's sentence above the statutory maximum

is subject to *Apprendi*'s Sixth Amendment jury trial right. *Blakely*, 542 U.S. at 303-04. Any sentencing scheme that permits the trial court to make factual findings that increase a sentence beyond the statutory maximum is necessarily unconstitutional. *See id.* at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority.").

However, this Court also recognized a legitimate role for judicial factfinding in discretionary sentencing schemes. In response to the dissent's criticism that *Blakely* validated unbridled exercises of judicial discretion under an indeterminate sentencing regime, while invalidating determinate sentencing regimes that limit such discretion, the majority explained that the salient Sixth Amendment concern is not the existence or extent of sentencing discretion, but whether the judicial factfinding increases the penalty above the offense-specific maximum set by the legislature.

> Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.

Blakely, 542 U.S. at 309. *Apprendi* similarly observed that,

when sentencing offenders, it is permissible "for judges to exercise discretion-taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481.

b. In *Booker*, this Court reaffirmed *Blakely* and applied its holding to the Federal Sentencing Guidelines, finding the Guidelines unconstitutional. However, *Booker* also reaffirmed that trial courts may make discretionary determinations based on various sentencing factors in selecting an appropriate term within a prescribed range. *Booker*, 125 S. Ct. at 750 ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); *see also id.* ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

Furthermore, in reforming the Federal Sentencing Guidelines, *Booker* set out an exemplar of a sentencing scheme under which the trial court, rather than the jury, makes the

factual determinations of aggravating and mitigating circumstances without violating the Sixth Amendment. Under the reconstituted Federal Sentencing Guidelines, the sentencing court is required to consider the Guidelines but is not bound by them. *Id.* at 764-65, 767. Moreover, while the sentencing court's discretion is not formally bound by the Guidelines, its discretion is not unfettered either. Instead, *Booker* imposes a tempered constraint on the sentencing court's discretion in selecting a sentence within the applicable range. *Booker* requires that the sentence imposed must be "reasonable" in relation to all of the applicable factors, or else it will not survive appellate review. *Id.* at 765-66. Accordingly, under the reformed Federal Sentencing Guidelines, a federal district court is not free to impose an aggravated term irrespective of the presence or absence of aggravating circumstances. Rather, any aggravated sentence imposed must be reasonable in relation to the presence of aggravating factors set out in the Federal Sentencing Guidelines and in consideration of other statutory concerns. *Id.* at 757.

c. It was with the reformed Guidelines in mind that the California Supreme Court analyzed California's determinate sentencing law in *Black*, 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740. Critically, the *Black* court articulated a construction of California's sentencing scheme that parallels the reformed Federal Sentencing Guidelines in function, and

that construction fully comports with *Blakely*.

Under California's system for determinate sentencing, the relevant sentencing range for most felonies and numerous enhancements consists of three possible terms of imprisonment (lower, middle, and upper term) that are specified typically by the same code section or set of code sections that enumerate the elements of the felony or enhancement. *See, e.g.*, Cal. Penal Code § 288.5 (setting out terms of six, twelve, or sixteen years for the offense of continuous sexual abuse of a minor). The sentencing judge's discretion in selecting among these three terms is guided by California Penal Code section 1170(b), which provides that the court shall impose the middle term unless there are circumstances in aggravation or mitigation of the crime. *Black*, 35 Cal. 4th at 1247, 113 P.3d at 538, 29 Cal. Rptr. 3d at 744.

California Penal Code section 1170.3 directs the California Judicial Counsel to promulgate rules of court to promote uniformity in the implementation of California's determinate sentencing law. These rules of court provide in relevant part that circumstances in aggravation and mitigation must be established by a preponderance of the evidence, and the upper term is "justified only if, after a consideration of all relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." Cal. R. Ct. 4.420(b). The "relevant facts" are included in the trial record, the

probation report, other properly received reports and statements, statements in aggravation or mitigation, and any additional evidence presented at a sentencing hearing. Cal. Penal Code § 1170(b); Cal. R. Ct. 4.420(b). A fact that is an element of the crime cannot be used to impose the upper term, nor can a fact charged and found as an enhancement unless the court exercises its discretion to strike the enhancement. *See* Cal. Penal Code § 1170(b); Cal. R. Ct. 4.420(c)-(d). In addition, the sentencing court must state its reasons for imposing an upper or lower term, including the circumstances the court considered to be aggravating or mitigating, to facilitate appellate review. *Black*, 35 Cal. 4th at 1248, 113 P.3d at 539, 29 Cal. Rptr. 3d at 745; Cal. R. Ct. 4.420(e).

The California Supreme Court explained that "[t]he sentencing judge retains considerable discretion to identify aggravating factors. Examples of aggravating factors are listed in the rules of court, but the judge is free to consider any 'additional criteria reasonably related to the decision being made.'" *Black*, 35 Cal. 4th at 1247, 113 P.3d at 538, 29 Cal. Rptr. 3d at 744-45(footnote omitted).

d. Under California's determinate sentencing law, the midterm sentence is not the statutory maximum for *Blakely* purposes. The midterm is the "presumptive" term and the court cannot impose the upper term in the absence of any aggravating circumstances. But the California Supreme Court held in *Black*

that, as a matter of state law, the "presumption" does nothing more than establish a "reasonableness" constraint on an otherwise wholly discretionary sentencing choice akin to that deemed constitutional in *Booker*. *Black* answered in the negative the question of whether California's determinate sentencing statute actually requires the judge before imposing an upper term to engage in "the type of factfinding that traditionally has been exercised by juries in the context of determining whether the elements of an offense have been proved." *See Black*, 35 Cal. 4th at 1254, 113 P.3d at 542, 29 Cal. Rptr. 3d at 749-50(footnote omitted). Instead, "in operation and effect, the provisions of the California determinate sentence law simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." *Black*, 35 Cal. 4th at 1254, 113 P.3d at 543, 29 Cal. Rptr. 3d at 751.

Under the California law, the choice among the three legislatively-prescribed sentences is entirely discretionary and may be based on *any* circumstances in aggravation or mitigation, regardless of whether they are specifically enumerated in the rules of court, so long as they are "reasonably related to the [sentencing] decision being made." *Black*, 35 Cal. 4th at 1255, 113 P.3d at 544, 29 Cal. Rptr. 3d at 751;

Cal. R. Ct. 4.408(a). Moreover, while the sentencing court should take the enumerated factors listed in the rules of court into account in deciding upon the sentence, it is not bound to impose an upper or lower term merely because one or more factors in aggravation or mitigation exist. Thus, the amount of discretion for a California sentencing court is equivalent to that for a federal district court in selecting a term after due consideration of the now-advisory Federal Sentencing Guidelines.

Black also makes clear that the constraints placed on the sentencing court's discretion under California's system are functionally equivalent to the "reasonableness" constraint placed on federal courts. The statutory presumption in favor of the midterm merely is a recognition that to assign to the defendant an upper term in the absence of *any* aggravating circumstances would be patently unreasonable. As the California Supreme Court explained, "Although [section 1170(b)] is worded in mandatory language, the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be *reasonable*." *Black*, 35 Cal. 4th at 1255; 113 P.3d at 544, 29 Cal. Rptr. 3d at 751. The California Supreme Court's interpretation of California statutory law is binding on this Court. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961).

It follows that, "even though [section 1170(b)] can be characterized as establishing the middle term sentence as a presumptive sentence, the upper term is the 'statutory maximum' for purposes of Sixth Amendment analysis. The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. The judicial fact-finding that occurs during that selection process is the same type of judicial factfinding that traditionally has been a part of the sentencing process. Therefore, the upper term is the 'maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict* . . . .'" *Black*, 35 Cal. 4th at 1257-58; 113 P.3d at 545, 29 Cal. Rptr. 3d at 753.

e. In the instant case, the state court of appeal anticipated the decision in *Black* and concluded that the upper term is the statutory maximum under *Blakely*. The California Supreme Court denied review based on its decision in *Black*. Consequently, certiorari is not warranted because this case represents nothing more than an application of this Court's decisions in *Blakely* and *Booker*. Petitioner's allegation that the rule of *Blakely* was misapplied is not a compelling reason

to gra t certiorari. Sup. Ct. R. 10.

2. Petitioner also contends that a "split of authority has developed in the state courts regarding the application of *Blakely* and *Booker*" to determinate sentencing systems. Pet. at 18 (comparing cases from Arizona, Colorado, Minnesota, New Jersey, North Carolina, Indiana, and Oregon, which held that certain forms of judicial factfinding under their determinate sentencing systems violated *Blakely*, with decisions from California, Hawaii, and Tennessee, which held that their determinate sentencing laws, as construed by the state courts, satisfied *Blakely*'s requirements); *see also State v. Lopez*, 2005-NMSC-036, ¶ 55, 2005 WL 3046661, at *17, __ P.3d __, (N.M. 2005) (holding New Mexico's determinate sentencing scheme comports with *Blakely* and *Booker*). Petitioner contends that granting certiorari is necessary to resolve this split.

Petitioner's contention is flawed. The present case does not represent an instance of courts of last resort in different states dividing on a federal question. *Cf.* Sup. Ct. R. 10(b). Far from reflecting a divergence in the interpretation of *Blakely*, the decisions cited by petitioner merely analyze how *Blakely* and *Booker* apply to particular sentence systems. The sentencing systems of the cited states vary—sometimes quite widely—in their structure, language, and application. Even where different states appear to have facially similar sentencing systems, those systems can differ

significantly in operation after the state courts construe the relevant statutes and rules applying to a particular case.

The decisions cited by petitioner do not conflict in their understanding and interpretation of *Blakely* and *Booker*. Rather, each decision cited by petitioner reflects an individual state supreme court's understanding of its own state's sentencing law and an analysis as to how, if at all, *Blakely* and *Booker* impact the state's sentencing system. These variations in the application of *Blakely* and *Booker*, which derive from state law constructions of different statutory sentencing schemes, do not constitute a conflict about the requirements of the Sixth Amendment. Consequently, a grant of certiorari is not warranted.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: December 9, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

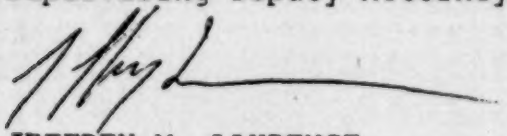
ROBERT R. ANDERSON
Chief Assistant Attorney General

MANUEL MEDEIROS
State Solicitor General

DONALD E. DE NICOLA
Deputy Solicitor General

GERALD A. ENGLER
Senior Assistant Attorney General

STAN HELFMAN
Supervising Deputy Attorney General



JEFFREY M. LAURENCE
Deputy Attorney General
Counsel of Record

Counsel for Respondent

No. 05-6551

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN CUNNINGHAM, *Petitioner*

v.

STATE OF CALIFORNIA, *Respondent*

CERTIFICATE OF SERVICE BY MAIL

I JEFFREY M. LAURENCE, a member of the Bar of this Court hereby certify that on December 12, 2005, one copy of the **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** in the above-entitled case were mailed, first class postage prepaid, to

Peter Gold
Attorney at Law
2269 Chestnut Street, #124
San Francisco, CA 94123

Counsel for Petitioner

I further certify that all parties required to be served have been served.

JEFFREY M. LAURENCE
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
(Tel:(415) 703-5897)
Counsel for Respondent

RECEIVED
DEC 14 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5897
Facsimile: (415) 703-1234
E-Mail: jeff.laurence@doj.ca.gov

December 12, 2005

Attn: Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Case Name: *John Cunningham v. State of California*
Case No.: 05-6551
Document Title: Brief in Opposition to Petition for Writ of Certiorari

Dear Mr. Suter:

Please process the enclosed document(s) as indicated below. Thank you for your cooperation.

☒ File the original(s) and return the copies endorsed-filed in the enclosed postage-paid envelope.

☐ File the original complaint, issue the original summons, and return the endorsed-filed copies of the complaint and the original summons in the enclosed postage-paid envelope.

☐ The enclosed original documents are submitted for the Judge's approval and signature. Please file the original(s) once signed, and conform and return the endorsed-filed copies in the enclosed postage-paid envelope.

Sincerely,

JEFFREY M. LAURENCE
Deputy Attorney General

For BILL LOCKYER
Attorney General

Encls.

RECEIVED
DEC 14 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-6551

In The
Supreme Court of the United States

JOHN CUNNINGHAM,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District, Division Five

REPLY BRIEF FOR PETITIONER

PETER GOLD
Counsel of Record
2269 Chestnut St., #124
San Francisco, CA 94123
(510) 872-6305

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. UNDER CALIFORNIA'S DETERMINATE SENTENCING LAW, THE MIDDLE TERM CONSTITUTES THE STATUTORY MAXIMUM FOR PURPOSES OF THE SIXTH AND FOURTEENTH AMENDMENTS 2

A. The Determinate Sentencing Law Does *Not* Permit Judges To Impose An Upper Term Sentence Based On The Jury's Verdict Alone 3

B. The State's Labels For The Determinate Sentencing Law Cannot Change The Manner In Which The Law Authorizes The Imposition Of Upper Term Sentences 5

C. The California Supreme Court's Interpretation Of The Determinate Sentencing Law In *Black* Is Not Binding On This Court For Purposes Of The Constitutional Question At Issue Here 7

II. THE DETERMINATE SENTENCING LAW'S PROCEDURE FOR IMPOSING AN UPPER TERM OPERATES JUST LIKE THE PROCEDURE FOR IMPOSING AN EXCEPTIONAL SENTENCE UNDER WASHINGTON'S SENTENCING SCHEME INVALIDATED IN *BLAKELY* 11

TABLE OF CONTENTS – Continued

Page

III. THE DETERMINATE SENTENCING LAW IS UNLIKE THE REVISED FEDERAL SENTENCING SCHEME UPHELD IN *BOOKER* BECAUSE IT ALLOWS FOR JUDICIAL FACTFINDING IN IMPOSING SENTENCE BEYOND THE STATUTORY MAXIMUM AUTHORIZED BY THE JURY'S VERDICT 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) ..... *passim*

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) ..... *passim*

McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) 9

People v. Black, 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (Cal. 2005) ..... *passim*

People v. Burbine, 106 Cal.App.4th 1250, 131 Cal.Rptr.2d 628 (Cal.App. 2003) 3

People v. Cruz, 38 Cal.App.4th 427, 45 Cal.Rtpr.2d 148 (Cal.App. 1995) 3

People v. DeSantis, 2 Cal.4th 1198, 831 P.2d 1210, 9 Cal.Rptr.2d 628 (Cal. 1992) 7

People v. Hernandez, 46 Cal.3d 194, 757 P.2d 1013, 249 Cal.Rptr. 850 (Cal. 1988) 4, 5

People v. Lobaugh, 188 Cal.App.3d 780, 233 Cal.Rptr. 683 (Cal.App. 1987) 3

People v. Olken, 125 Cal.App.3d 1064, 178 Cal.Rptr. 497 (Cal.App. 1981) 5

People v. Osband, 13 Cal.4th 622, 919 P.2d 640, 55 Cal.Rptr.2d 26 (Cal. 1996) 3

People v. Scott, 9 Cal.4th 331, 885 P.2d 1040, 36 Cal.Rptr.2d 627 (Cal. 1994) 4, 5

People v. Williams, 17 Cal.4th 148, 948 P.2d 429, 69 Cal.Rptr.2d 917 (Cal. 1998) 7

TABLE OF AUTHORITIES – Continued

Page

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) 1, 8, 9, 12

State v. Gore, 143 Wash.2d 288, 21 P.3d 262 (Wash. 2001) 9, 10

United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) 1, 2, 7, 14, 15

Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) 9

Washington v. Recuenco, ___ U.S. ___, 126 S.Ct. 2546, ___ L.Ed.2d ___ (2006) 1, 10

STATUTES

Cal. Pen. Code § 667.8 5

Cal. Pen. Code § 1170(b) 3, 4, 8, 15

Wash. Rev. Code Ann. § 9.94A.125 14

CALIFORNIA RULES OF COURT

Rule 4.420(a) 3, 15

Rule 4.420(b) 15

Rule 4.420(d) 3

REPLY BRIEF FOR PETITIONER

The bright-line rule animating this Court's recent Sixth and Fourteenth Amendment jurisprudence dictates that *any* judicial factfinding which increases a sentence beyond the maximum authorized by the jury's verdict or the defendant's admissions violates the defendant's constitutional rights to a jury trial and proof beyond a reasonable doubt. *See, e.g., United States v. Booker*, 543 U.S. 220, 232, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *accord Washington v. Recuenco*, ___ U.S. ___, 126 S.Ct. 2546, 2549, ___ L.Ed.2d ___ (2006). In his opening brief on the merits, petitioner explained that in allowing judges to impose enhanced sentences beyond the statutory maximum based on their finding of factors in aggravation, California's Determinate Sentencing Law operates just like the Washington state sentencing scheme invalidated in *Blakely*. Under the DSL, the jury's verdict by itself only authorizes a trial judge to impose a middle term sentence. In order to depart from the middle term and impose an upper term, the judge must first find one or more aggravating factors. Thus, the middle term constitutes the statutory maximum for purposes of *Blakely* and *Apprendi*, and any judicial factfinding used to justify an upper term runs afoul of the Sixth and Fourteenth Amendments.

The State of California and its *amicus* claim that under the DSL, the upper term is the statutory maximum for Sixth Amendment purposes because a judge may impose the upper term based on the jury's verdict alone. Therefore, they maintain, the imposition of an enhanced sentence based on the judge's own determination of factors in aggravation is constitutional. However, their position rests on tortured reasoning and the same arguments raised by the state of Washington in *Blakely*, but soundly rejected by this Court.

The state and its *amicus* further attempt to fit the square peg of the DSL into the round hole of constitutionality

carved out by this Court in *Booker*. To accept their convoluted logic is to accept the conclusion that *Booker* implicitly overruled *Blakely*. Although the DSL and the revised federal system may have some comparable features, they are different in at least one constitutionally-significant regard – the DSL allows for judicial factfinding in imposing sentence *beyond* the statutory maximum authorized by the jury's verdict, while the federal system does not. This distinction makes all the difference as to why California's DSL violates the Sixth and Fourteenth Amendments and the revised federal system does not.

I. UNDER CALIFORNIA'S DETERMINATE SENTENCING LAW, THE MIDDLE TERM CONSTITUTES THE STATUTORY MAXIMUM FOR PURPOSES OF THE SIXTH AND FOURTEENTH AMENDMENTS.

The state and petitioner agree on the constitutional principle controlling this case: Other than the fact of a prior conviction, any fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Resp. Br. at 3; Pet. Br. at 10, 13-14; *see also Blakely*, 542 U.S. at 301, 124 S.Ct. 2531; *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. However, the parties disagree as to what constitutes the prescribed statutory maximum sentence under California's DSL.

To justify its position that the upper term is the statutory maximum, the state relies on a series of faulty arguments. First, the state claims that a trial judge may impose an upper term sentence based on the jury's verdict alone. Resp. Br. at 4, 9, 24-25. Second, the state argues that a judge's choice from among the three sentences within the "base range" is constrained by a requirement of "reasonableness." Resp. Br. at 4, 6, 11-12, 31-32. Finally, the state maintains that the California Supreme Court has interpreted California law in a manner which resolves the constitutional question at issue here and is binding on

this Court. Resp. Br. at 18-19, 33. The state's analysis does not withstand scrutiny.

A. The Determinate Sentencing Law Does *Not* Permit Judges To Impose An Upper Term Sentence Based On The Jury's Verdict Alone.

Throughout its brief, the state represents that "the trial court *is* legally authorized under state law to impose the upper term based on the jury verdict alone." Resp. Br. at 24-25 (emphasis in original); *see also* Resp. Br. at 4, 9, 13, 19, 34, 46. The soundness of every one of the state's arguments rests on this frequently repeated claim. Unfortunately, it is patently false, as California's DSL, its case law, and even the state's brief demonstrate.

California Penal Code § 1170(b) provides that "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall* order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Emphasis supplied); *see also* Cal. Rules of Court, rule 4.420(a). Thus, judges may depart from the middle term and impose the upper term only where they first find one or more factors in aggravation; they are *prohibited* from imposing the upper term based solely on the jury's verdict. *Accord* Cal. Rules of Court, rule 4.420(d) ["A fact that is an element of the crime shall not be used to impose the upper term."].

California case law similarly holds that when a defendant is convicted of a felony offense specifying three possible prison terms, the sentencing judge must impose the middle term unless the judge finds aggravating or mitigating factors. *People v. Black*, 35 Cal.4th 1238, 1247, 113 P.3d 534, 538, 29 Cal.Rptr.3d 740, 744 (Cal. 2005); *People v. Lobaugh*, 188 Cal.App.3d 780, 785, 233 Cal.Rptr. 683, 686 (Cal.App. 1987). Cases abound in which judges properly imposed an upper term sentence after finding factors in aggravation. *See, e.g., People v. Osband*, 13 Cal.4th 622, 729-730, 919 P.2d 640, 709, 55 Cal.Rptr.2d 26, 95 (Cal. 1996); *People v. Burbine*, 106 Cal.App.4th 1250, 1263-1264, 131 Cal.Rptr.2d 628, 637 (Cal.App. 2003); *People v. Cruz*, 38 Cal.App.4th 427, 433-434,

45 Cal.Rptr.2d 148, 152 (Cal.App. 1995). However, the state fails to cite even a single case in which a California judge imposed the upper term without finding at least one aggravating factor or in which a California appellate court held that a judge may legally do so. That is because none exists. If a sentencing judge stated on the record, "I don't find any aggravating factors, but I'm still going to impose the upper term," a California appellate court would assuredly reverse that sentence as unlawful.

The state itself appears to recognize that if judges do in fact impose an upper term based on the jury's verdict alone, the resultant sentence cannot stand. Resp. Br. at 6 ["California Penal Code section 1170(b) recognizes that the upper term is unreasonable and an abuse of discretion absent aggravation of the crime."]; Resp. Br. at 12 [section 1170(b) "recognizes that the decision to impose [an upper] term in the absence of *any* factors in aggravation . . . is necessarily unreasonable."] (emphasis in original); Resp. Br. at 31-32 [same]. This implicit concession completely undermines the state's position that the upper term constitutes the prescribed statutory maximum. Since the imposition of an upper term sentence in the absence of aggravating factors would necessarily compel reversal, judges are precluded from imposing such sentences. *See Black*, 35 Cal.4th at 1260, 113 P.3d at 547, 29 Cal.Rptr.3d at 755 ["in a case in which no such aggravating factor can be found, the judge *cannot* impose the upper term."] (emphasis supplied). The middle term is therefore the maximum sentence judges may impose based on the jury's verdict alone. Pursuant to *Blakely* and *Apprendi*, then, the middle term – *not* the upper term – constitutes the "statutory maximum" for Sixth and Fourteenth Amendment purposes. *Blakely*, 542 U.S. at 303-304, 124 S.Ct. 2531.

Nevertheless, the state relies on two California Supreme Court decisions which it believes support its position: *People v. Hernandez*, 46 Cal.3d 194, 757 P.2d 1013, 249 Cal.Rptr. 850 (Cal. 1988), and *People v. Scott*, 9 Cal.4th 331, 885 P.2d 1040, 36 Cal.Rptr.2d 627 (Cal. 1994). Resp. Br. at 20-23. Neither of these cases further the claim that the DSL functions in a constitutional manner.

In *Hernandez*, the California Supreme Court held that as a matter of statutory construction, a judge could not add a three-year term to defendant's sentence based on a California Penal Code § 667.8 kidnapping for purposes of rape enhancement where the prosecution had failed to plead or prove a violation of that statute. *Hernandez*, 46 Cal.3d at 197, 757 P.2d at 1013, 249 Cal.Rptr. at 850. In *Scott*, the court held that a defendant waives his right to raise a sentencing error on appeal for "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." *Scott*, 9 Cal.4th at 353, 885 P.2d at 1053, 36 Cal.Rptr.2d at 640.[1] Thus, neither *Hernandez* nor *Scott* had anything to do with whether a sentencing judge could properly impose an upper term absent a factor in aggravation. Moreover, both cases were decided before *Blakely* and *Apprendi*. Therefore, as the state forthrightly concedes, any dictum in those cases has limited, if any value in assessing California's DSL since it was made "without an appreciation" for the post-*Blakely* and post-*Apprendi* world. Resp. Br. at 23, n.7.

B. The State's Labels For The Determinate Sentencing Law Cannot Change The Manner In Which The Law Authorizes The Imposition Of Upper Term Sentences.

The state characterizes the DSL as offering trial judges a choice of three sentences within a particular "base range." *See, e.g.*, Resp. Br. at 4-9, 11-13, 19, 21, 23-28. According to the state, judges can impose an upper term sentence within

---

[1] *Scott* specifically dealt with a judge's failure to state his reasons for imposing an upper term sentence, *not* with a judge's imposition of the upper term in the absence of aggravating factors – which the record in *Scott* reflected in abundance. *See Scott*, 9 Cal.4th at 339-340, 885 P.2d at 1043-1044, 36 Cal.Rptr.2d at 630-631. The state also discusses California habeas corpus law, but to the same effect; a defendant may not collaterally challenge the *manner* in which a judge in California imposed an otherwise lawful sentence. Resp. Br. at 23, citing *People v. Olken*, 125 Cal.App.3d 1064, 1067-1068, 178 Cal.Rptr. 497, 499 (Cal.App. 1981).

that "base range" in the absence of aggravating factors, although such a sentence would be "necessarily unreasonable." Resp. Br. at 12, 32; *see also* Resp. Br. at 6; Amicus Br. at 17.[2] Whatever labels or terminology the state applies to describe the DSL or a judge's actions thereunder, the manner in which the DSL authorizes the imposition of upper term sentences remains constant. *See Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348 ["[T]he relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"]. The DSL flat out prohibits its judges from imposing an upper term in the absence of aggravating factors, whether or not such a sentence is also labelled as "necessarily unreasonable." Moreover, even accepting the state's portrayal of such sentences as inherently unreasonable would not change the constitutionality

---

[2] Despite the state's frequent use of the terms "base range" and "base range triad" to cumulatively describe the lower, middle, and upper terms, no published case in California has ever used these terms to describe a judge's sentencing options under the DSL. Apparently, the state has invented this phrasing to suggest that the upper term constitutes the statutory maximum under this Court's precedents. *See, e.g.,* Resp. Br. at 15 ["In concrete terms, if the legislature establishes a base range for an offense, and creates departure statutes predicated on additional findings, the 'statutory maximum' for *Apprendi* purposes is the *maximum of the base range*, and any facts necessary for departing from that base range are subject to the Sixth Amendment's jury-trial requirement. . . ."] (emphasis in original); Resp. Br. at 16 ["Under *Apprendi* and *Blakely*, a fact that permits a judge to increase a defendant's sentence above the statutorily established *base range* for that offense is subject to the Sixth Amendment jury trial right."] (emphasis supplied); Resp. Br. at 18 ["Once state law establishes the *base range* legally available to the trial court from the verdict, the statutory maximum for constitutional purposes is fixed at the top of that *base range*."] (emphasis supplied). The state's use of "base range" to describe an aspect of the DSL is irrelevant to the constitutional question raised in this case. Just like the sentencing schemes invalidated in *Apprendi*, *Ring*, *Blakely*, and *Booker*, the DSL unconstitutionally permits judicial factfinding of aggravating factors to justify the imposition of a sentence greater than the maximum authorized by the jury's verdict. It matters not that the state for the first time labels the lower, middle, and upper term sentencing choices as the "base range."

of the DSL in permitting judges to impose them. *Accord Booker,* 543 U.S. at 311, 125 S.Ct. 738 (dis. opn. of Scalia, J.) ["any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional."].

Similarly, the state correctly observes that the sentencing decision in California to select the lower, middle, or upper term is reviewed under a deferential abuse of discretion standard, under which appellate courts assess whether the imposed sentence "'falls outside the bounds of reason.'" *People v. Williams*, 17 Cal.4th 148, 162, 948 P.2d 429, 438, 69 Cal.Rptr.2d 917, 926 (Cal. 1998), quoting *People v. DeSantis*, 2 Cal.4th 1198, 1226, 831 P.2d 1210, 9 Cal.Rptr.2d 628, 644 (Cal. 1992); *see* Resp. Br. at 5, 11, 33, 36. Yet, the fact that judges' sentencing choices are reviewed for an abuse of discretion by no means permits them to impose an upper term in the absence of aggravating factors; the DSL does not grant judges the discretion to impose such a sentence in the first place. Therefore, regardless of the labels used to characterize the DSL or the standard of review employed to assess judges' sentencing decisions, the DSL's procedure for authorizing the imposition of an upper term – requiring the finding of at least one aggravating factor – remains the same.

C. The California Supreme Court's Interpretation Of The Determinate Sentencing Law In *Black* Is Not Binding On This Court For Purposes Of The Constitutional Question At Issue Here.

The state and its *amicus* contend that the California Supreme Court's decision in *People v. Black*, which held that the DSL's procedure for imposing the upper term does not violate the federal constitution, is binding on this Court. Resp. Br. at 18-19, 33; Amicus Br. at 17. To the contrary, *Black* neither aids the state's position nor is it controlling here.

Petitioner has explained that in *Black*, the California Supreme Court misinterpreted this Court's Sixth and Fourteenth Amendment jurisprudence in finding that the DSL's procedure for imposing an upper term passes constitutional muster. Pet. Br. at 25-30. The state counters that the California Supreme Court's interpretation of the DSL is "'authoritative'" and "binding on this Court." Resp. Br. at 18, 33, citing *Ring v. Arizona,* 536 U.S. at 597-603, 122 S.Ct. 2428. However, the court's holding in *Black* does not limit this Court's review of the DSL's constitutionality.

Significantly, the parties do not dispute the California Supreme Court's interpretation in *Black* of California's statutes. There, the court construed California Penal Code § 1170(b) to mean that "only in a case in which a judge could not reasonably identify any relevant aggravating factor in either the circumstances of the crime or the defendant's prior or current criminal conduct would the judge be limited to imposing no more than a middle-term sentence." *Black*, 35 Cal.4th at 1258, 113 P.3d at 545-546, 29 Cal.Rptr.3d at 752-753; *see* Resp. Br. at 11. It is this very interpretation of state law which leads ineluctably to the conclusion that trial judges may not impose an upper term under the DSL without first finding at least one factor in aggravation, rendering the middle term the statutory maximum for purposes of the Sixth and Fourteenth Amendments.

After construing state law, however, the court in *Black* proceeded to interpret *federal constitutional law*, opining that the upper term under the DSL constitutes the statutory maximum for purposes of Sixth Amendment analysis because California judges retain discretion over whether to impose the upper term even after finding factors in aggravation. *Black*, 35 Cal.4th at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750. What constitutes the statutory maximum and whether the DSL's procedure for imposing an upper term violates the Sixth and Fourteenth Amendments are questions of federal constitutional law on which the California Supreme Court's opinion is neither authoritative nor, in this instance, correct.

Moreover, the state's reliance on *Ring* is misplaced. There, the Arizona Supreme Court had found that its death penalty law did not authorize a sentence of death based solely on a jury's verdict of guilt, but also required a judicial finding of at least one aggravating circumstance. 536 U.S. at 595-596, 122 S.Ct. 2428. The Arizona Supreme Court's finding conflicted with this Court's own, earlier interpretation of Arizona's death penalty law in *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). This Court then found that the Arizona Supreme Court's subsequent construction of Arizona statutory law was "authoritative." *Ring*, 536 U.S. at 603, 122 S.Ct. 2428. The Court proceeded to hold that the state's death penalty law violated federal constitutional law pursuant to *Apprendi* by allowing judicial fact-finding to justify a sentence greater than that authorized by the jury's verdict standing alone. *Id.* at 604-609, 110 S.Ct. 3047. Thus, Arizona's description of its law did not resolve the constitutional question; this Court did.

Similarly, in *Blakely v. Washington*, this Court faced a federal constitutional challenge to Washington state's sentencing scheme previously rejected by the Washington Supreme Court. In *State v. Gore*, 143 Wash.2d 288, 21 P.3d 262 (Wash. 2001), the Washington Supreme Court had concluded that because the Washington legislature provided a maximum penalty for felonies greater than the sentence defendant received, that maximum penalty constituted the statutory maximum for *Apprendi* purposes. *Id.* at 314, 21 P.3d at 277 ["The state statutory scheme permits a judge to impose an exceptional sentence – still within the range determined by the Legislature and not exceeding the maximum – after considering the circumstances of an offense, and, as *McMillan*[3] and *Apprendi* indicate, it may do so without the factual determinations being charged, submitted to a jury, or proved beyond a reasonable doubt."]. In *Blakely*, this Court

---

[3] *McMillan v. Pennsylvania*, 477 U.S. 79, 93, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

rejected the Washington Supreme Court's earlier analysis in *Gore* of federal constitutional law as applied to Washington's sentencing scheme, holding that the statutory maximum was not the maximum term set out by the legislature, but the maximum sentence a judge may impose based solely on facts reflected in the jury's verdict or admitted by the defendant. *Blakely*, 542 U.S. at 303-304, 124 S.Ct. 2531;[4] *see also Washington v. Recuenco*, 126 S.Ct. at 2549 [rejecting contention that this Court was powerless to reverse Washington Supreme Court's determination that a *Blakely* violation constitutes structural error not amenable to harmless error analysis]. Accordingly, the California Supreme Court's determination in *Black* that the upper term constitutes the statutory maximum for purposes of the Sixth and Fourteenth

---

[4] The state's *amicus* observes that the Washington Supreme Court never ruled, as the California Supreme Court has, that the necessity for finding a factor in aggravation before departing upward from the presumptive middle term is merely a requirement that the departure be reasonable. Amicus Br. at 24. This distinction is not one of kind, but merely of degree. Prior to *Blakely*, a sentencing judge in Washington could depart upward from the presumptive sentence if he found "substantial and compelling reasons" to do so, *Blakely*, 542 U.S. at 299, 124 S.Ct. 253, while a California judge may depart upward from the middle term if the presence of aggravating factors makes it reasonable to do so, *see Black*, 35 Cal.4th at 1255, 113 P.3d at 544, 29 Cal.Rptr.3d at 751. Thus, it was merely harder to deviate from Washington's presumptive term than from California's. *Blakely* itself rejects this distinction as meaningless: "Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense." *Blakely*, 542 U.S. at 305, 124 S.Ct. 2531.

Moreover, as noted above, in *State v. Gore* the Washington Supreme Court had construed Washington law in a manner it believed complied with *Apprendi*, but in *Blakely* this Court easily disregarded that interpretation. *Blakely*, 542 U.S. at 299-300, 303-304, 124 S.Ct. 2531. That the Washington Supreme Court in *Gore* sought to avoid the bright-line rule of *Apprendi* on different grounds than the California Supreme Court did in *Black* is of no moment; neither may escape federal constitutional requirements merely through the use of creative state law interpretations.

Amendments is an interpretation of federal constitutional law which is not binding on this Court.

II. THE DETERMINATE SENTENCING LAW'S PROCEDURE FOR IMPOSING AN UPPER TERM OPERATES JUST LIKE THE PROCEDURE FOR IMPOSING AN EXCEPTIONAL SENTENCE UNDER WASHINGTON'S SENTENCING SCHEME INVALIDATED IN *BLAKELY*.

Petitioner explained in his opening brief that an upward deviation from the DSL's statutory maximum sentence, or middle term, operates exactly like an upward deviation under Washington state's sentencing scheme struck down in *Blakely*. Pet. Br. at 18-19. The state and its *amicus* maintain to the contrary that these sentencing systems operate in fundamentally different ways. Resp. Br. at 29; Amicus Br. at 23. However, to support this claim, they merely recycle the same arguments the state of Washington and its *amici* raised in *Blakely*, but which this Court discredited.

For instance, the state argues that unlike the sentencing scheme at issue in *Blakely*, the DSL authorizes judges to depart from the middle term and impose the upper term based solely on the jury's verdict:

> Under Washington law, the trial court was not legally authorized to depart from the standard range of forty-nine to fifty-three months without additional factual findings. . . . By contrast, California law makes the upper term a component of the "standard range," not a departure from it, and the trial court *is* legally authorized under state law to impose the upper term based on the jury verdict alone.

Resp. Br. at 24-25 (emphasis in original); *see also* Resp. Br. at 19. Yet, this is exactly the same argument Washington state made in *Blakely* to avoid the application of *Apprendi* and *Ring* to its sentencing scheme:

> The Washington guidelines are distinctly different from the statutes considered in *Apprendi* and

> *Ring*. *Apprendi* and *Ring* concerned statutes authorizing punishment in addition to that within the court's discretion on conviction and only on proof of one or more specific, enumerated facts. *Under the Washington guidelines, an exceptional sentence is within the court's discretion as a result of a guilty verdict.*

Resp. Br. in *Blakely* at 15 (emphasis supplied). In *Blakely*, this Court rejected Washington's position for the same reason the state's position here fails: "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." *Blakely*, 542 U.S. at 305, 124 S.Ct. 2531.

The state and its *amicus* also contend that a distinguishing factor of the DSL is that it "authorizes judges to exercise broad discretion [to impose an upper term], constrained by a reasonableness requirement," Amicus Br. at 7; *see also* Resp. Br. at 29, whereas judges' discretion to impose an exceptional sentence under Washington's sentencing scheme was "tightly confined," Amicus Br. at 24. However, Washington state similarly argued in *Blakely* that its sentencing scheme operated in a constitutional manner since "'[t]he only restriction on discretion is a requirement to articulate a substantial and compelling reason for imposing an exceptional sentence.' (Citation omitted)." Resp. Br. in *Blakely* at 25; *see also* Resp. Br. in *Blakely* at 7 [characterizing Washington's sentencing law as granting judges "absolute discretion" within narrow ranges]; United States Amicus Br. in *Blakely* at 16, 21 [Under Washington law, judge may impose an exceptional sentence "based on a virtually unlimited set of facts," and after "exercis[ing] his own judgment that the case involves substantial and compelling reasons justifying an exceptional sentence."]. Nevertheless, the Court in *Blakely* exposed this contention as fallacious: "Nor does it matter that the judge must, after finding aggravating facts, make

a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense." *Blakely*, 542 U.S. at 305, 124 S.Ct. 2531.

The state posits the further distinction that unlike Washington's sentencing scheme, the DSL provides a defendant "full notice that he or she risks the upper term sentence for any given felony because the upper term is one of the three possible terms of the base range that appears either in the very code section or set of code sections that enumerate the elements of the offense. . . ." Resp. Br. at 27; *see also* Amicus Br. at 22. Once more, this is the precise argument Washington state made in *Blakely* to distinguish its sentencing system from *Apprendi's*:

> Mr. Blakely . . . cannot complain that he had no notice that the maximum penalty for his crimes was ten years. The maximum penalty was plain in the charging information. . . . The maximum penalty of ten years was plain in the plea statement. And it was plain in the statute.

Resp. Br. in *Blakely* at 35 (citations omitted); *see also* United States Amicus Br. in *Blakely* at 24 ["Even when a sentencing judge may make a factual finding that authorizes increased punishment, the law puts the defendant on notice that he will be exposed to the higher punishment if the judge makes the required finding. . . ."]. Once more, this Court in *Blakely* rejected the state's position, finding it unfair that "a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon" at sentencing "based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." *Blakely*, 542 U.S. at 311-312, 124 S.Ct. 2531. The very same reasoning applies to the DSL's procedure under which judges impose the upper term.

Finally, the state contends: "Petitioner cannot plausibly argue, as was the case in *Apprendi* and *Blakely*, that his sentence represents an upward departure from the

appropriate base range. California provides for jury trials for upward departures through enhancements or alternative sentencing schemes." Resp. Br. at 12-13; *see also* Resp. Br. at 26-27; Amicus Br. at 2-3. But Washington's sentencing system also incorporated sentence enhancements and required that a jury find them true beyond a reasonable doubt. *See* Wash. Rev. Code Ann. § 9.94A.125; Resp. Br. in *Blakely* at 8, n.4; Pet. Br. in *Blakely* at 19. In fact, the DSL's provision of jury trials for enhancement allegations shows only that California is also well equipped to provide such protections for findings on aggravating factors, which like enhancements, authorize punishment above the statutory maximum.

III. THE DETERMINATE SENTENCING LAW IS UNLIKE THE REVISED FEDERAL SENTENCING SCHEME UPHELD IN *BOOKER* BECAUSE IT ALLOWS FOR JUDICIAL FACTFINDING IN IMPOSING SENTENCE BEYOND THE STATUTORY MAXIMUM AUTHORIZED BY THE JURY'S VERDICT.

Even though the procedure for imposing an upper term sentence under the DSL contravenes the bright-line rule set forth in *Blakely* and *Apprendi*, the state and its *amicus* maintain that the DSL operates in a constitutional manner because it complies with *United States v. Booker*. Resp. Br. at 35-45; Amicus Br. at 8-25. However, their position suffers in a number of respects. Most importantly, it masks the critical difference between the DSL and the revised federal system – the DSL allows for judicial factfinding in imposing sentence *beyond* the statutory maximum authorized by the jury's verdict, while the revised federal system does not. In addition, their position makes much more of the notion of reasonableness review, and that concept's application to California's sentencing scheme, than *Booker* warrants. Indeed, if taken to its logical conclusion, the reasoning of the state and its *amicus* leads to the conclusion that *Booker* implicitly overruled *Blakely*.

The state and its *amicus* contend that the DSL "is consistent with the structure and scheme found constitutional in the remedial portion of *Booker*." Resp. Br. at 36; Amicus Br. at 17-21.[5] At base, the claim of equivalency rests upon their unfounded, but oft-repeated assertion that the DSL authorizes judges to impose an upper term sentence based on the jury's verdict alone. Resp. Br. at 36; Amicus Br. at 17. As detailed throughout this brief, the language of the relevant statutes, the California Supreme Court's decision in *Black*, and even the state's own brief acknowledge that the DSL does *not* permit a judge to impose an upper term absent a judicially-found factor in aggravation. § 1170(b); Cal. Rules of Court, rule 4.420(a) and (b); *Black*, 35 Cal.4th at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750; Resp. Br. at 44-45.

Nevertheless, the state seeks to save the DSL by claiming that the "nature and quality of discretion accorded a California sentencing judge is constitutionally equivalent to the discretion given a federal district court judge in selecting a term after consideration of the now-advisory Federal Sentencing Guidelines." Resp. Br. at 37; Amicus Br. at 18. This is merely a further twist on the state's basic dodge. The state now claims that section 1170(b) simply declares a "legislative preference for the midterm," much as the post-*Booker* advisory guidelines legitimately reflect Congress' sentencing preferences which federal judges must take into account. Resp. Br. at 37; Amicus Br. at 17. There is, however, a fundamental difference between California's system and that approved by *Booker*. In California, what the state calls a legislative "preference" for the middle term is in fact a *mandatory* requirement. § 1170(b) ["the court *shall* order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime."] (emphasis supplied). In

---

[5] If the DSL were as similar to the post-*Booker* federal system as the state alleges, surely the United States Solicitor General's office would have participated as *amicus* in support of respondent and sought to take part during oral argument in this case. It has not.

Booker, by contrast, the Court *excised* that portion of the federal guidelines which made their application mandatory. *Booker*, 543 U.S. at 259, 125 S.Ct. 738. This distinction is critical; as *all* of the Justices in *Booker* agreed, the constitutional problem identified therein would not exist if the guidelines were merely advisory. *Id.* at 233, 259, 125 S.Ct. 738. Similarly, the constitutional problem with the DSL would cease to exist without its mandate for the middle term in the absence of aggravating or mitigating factors.

As a further similarity between the DSL and the post-*Booker* federal sentencing scheme, the state and its *amicus* submit that California's review of sentencing decisions for an abuse of discretion is akin to the reasonableness review appended to the advisory guideline system in *Booker*. Resp. Br. at 36; Amicus Br. at 17-18. Yet, their observations about how appellate courts review judges' sentencing decisions do nothing to salvage the constitutionality of the DSL. Because the DSL prohibits judges from imposing an upper term without finding facts beyond those included in the jury's verdict or the defendant's admissions, it violates the Sixth and Fourteenth Amendments just as surely as the Washington State and Federal Guideline systems did in *Blakely* and *Booker*. Were the standard of review of sentencing decisions constitutionally definitive, the *Booker* Court could have remedied the defect in the Guidelines merely by adding the reasonableness review. Instead, the Court determined that it also had to excise the portion of the Guidelines which made their application mandatory, a step which neither the state, its *amicus*, nor the California Supreme Court believes is necessary to rescue the DSL. *See* Resp. Br. at 36-38, 43-45; Amicus Br. at 29-30; *Black*, 35 Cal.4th at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750.[6]

---

[6] After nearly thirty pages of arguing that the DSL does not violate *Apprendi* or its progeny, the state's *amicus* finally posits that *Black* in fact *remedied* the *Apprendi* violation by implicitly "*Booker*-izing" California's system. Amicus Br. at 29. *Amicus* charges that it would be

(Continued on following page)

Moreover, the state reads far more into the concept of reasonableness review set forth in *Booker* than is warranted by that decision. According to the state:

> If the [federal district] court points to no facts justifying the deviation from the legislatively preferred sentencing choices, the reasonableness of the court's decision to sentence above the Guidelines range progressively diminishes as the deviation increases. A substantial deviation *without any justification*, would inevitably be unreasonable. Although under the reformed Guidelines system it is unnecessary to identify at what point an upward variance, without any facts in support, becomes unreasonable, that point necessarily occurs below the statutory maximum, or else the reasonableness review constraint becomes meaningless.

Resp. Br. at 39 (emphasis in original); *see also* Resp. Br. at 43 ["To impose the statutory maximum for a run-of-the-mill offender without *any* additional justification will always be unreasonable" and "such a sentence would not be *unauthorized*, but *unreasonable*."] (emphasis in original). The state claims that just as in the post-*Booker* federal system, under the DSL the imposition of an upper-term sentence in the

---

"the height of formalism" to require the state to do so explicitly. Amicus Br. at 29. Petitioner is not as willing as *amicus* to deduce unstated reasoning from the California Supreme Court's opinion; if that court had perceived a constitutional problem with its sentencing system in the wake of *Blakely* and *Apprendi*, surely it would have simply said so. It did not. Instead, it reiterated, in accord with California's unambiguous statutes, that judges may depart upward from the middle term only if they find one or more aggravating facts beyond those inherent in the jury's verdict. *People v. Black*, 35 Cal.4th at 1247, 113 P.3d at 538, 29 Cal.Rptr.3d at 744. It found the system constitutional anyway because California judges retain discretion over *whether* to impose the upper term upon finding aggravating factors. *Black*, 35 Cal.4th at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750. As petitioner stated in his opening brief, this attribute does not save the DSL; the middle term is the statutory maximum before and *after Black*, and it is this undisputed aspect of the DSL which renders it unconstitutional. Pet. Br. at 27-28.

absence of any aggravating factors is authorized, although inherently unreasonable.

The principal flaw in the state's position, of course, is that *Booker* simply does not include the detailed analysis of reasonableness review upon which the state relies. Indeed, the dissents from the remedial opinion in *Booker* specifically noted the absence of such analysis. *Booker*, 543 U.S. at 301, 125 S.Ct. 738 (dis. opn. of Stevens, J.) ["How will a judge go about determining how much deference to give to the applicable Guidelines range? How will a court of appeals review for reasonableness a district court's decision that the need for 'just punishment' and 'adequate deterrence to criminal conduct' simply outweighs the considerations contemplated by the Sentencing Commission? (Citation omitted). What if a sentencing judge determines that a defendant's need for 'educational or vocational training, medical care, or other correctional treatment in the most effective manner,' (citation omitted), requires disregarding the stiff Guidelines range Congress presumably preferred?"]; *Id.* at 311, 125 S.Ct. 738 (dis. opn. of Scalia, J.) ["no one knows - and perhaps no one is meant to know - how advisory Guidelines and 'unreasonableness' review will function in practice."]. To the extent that the federal appellate courts have interpreted *Booker* in developing some of the particulars of reasonableness review – as the state discusses in some detail, Resp. Br. at 39-43 – *Booker* hardly mandated these developments, which have evolved without guidance from this Court.[7]

---

[7] Without supporting authority from this Court, the state claims that the post-*Booker* sentencing scheme "dictates a range of reasonable choices roughly proportionate to the Guidelines range," and that at some, unspecified point, as a judge deviates upward further from the range, the sentence becomes unreasonable, presumably requiring reversal. Resp. Br. at 38-39, 42-43. However, it is by no means clear that the state has correctly assessed the federal system. As noted, *Booker* did not "dictate" that courts must follow the Guidelines, roughly or exactly; it specified that the courts are "not bound to apply the Guidelines." *Booker*, 543 U.S. at 264, 125 S.Ct. 738. Indeed, as Justice Scalia noted in dissent, and without response from the majority, if the majority "thought the Guidelines not only had to be 'considered' (as the

(Continued on following page)

The state fails to offer any cogent reason why the Court should address these potentially far-reaching issues in this case, which concerns only the application of the Sixth and Fourteenth Amendments to California's sentencing law.

Furthermore, even if the post-*Booker* system operated as the state postulates, there still would be no significance to the state's assertion that, like the federal system, the DSL authorizes sentencing judges to impose an upper term absent any aggravating factors, but if they do so, the resulting sentence will be necessarily *unreasonable*, and therefore require reversal. Resp. Br. at 38, 44-45. As already discussed in detail, the DSL prohibits judges from imposing an upper term without supporting factors in aggravation, whether or not such a sentence is also labelled "necessarily unreasonable."

Nevertheless, the state argues that "[u]nder *Booker*, a threshold constraint on the court's sentencing authority triggers the Sixth Amendment jury-trial right. A reasonableness constraint on the court's ultimate sentencing decision does not." Resp. Br. at 35. Unfortunately, the state cites no authority for the distinction it has concocted, nor does any exist in this Court's well-developed jurisprudence. In fact, if *Booker* made this a constitutionally valid distinction, it would effectively overrule *Blakely*. In theory judges have the power to impose any sentence, subject to reversal on appeal. If a jurisdiction may simply characterize an invalid sentence as authorized, but just "necessarily unreasonable," this would render the statutory maximum test of *Blakely* and *Apprendi* meaningless. *Accord Booker*, 543 U.S. at 311, 125 S.Ct. 738 (dis. opn. of Scalia, J.) ["any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines

---

amputated statute requires) but had generally to be followed - its opinion would surely say so" and "[i]f those policy decisions [reflected in the Guidelines] are no longer mandatory, the sentencing judge is free to disagree with them . . . as are appellate judges." *Id.* at 306, 125 S.Ct. 738 (dis. opn. of Scalia, J.).

system that the Court today holds unconstitutional."]. Of course, such facile use of terminology smacks of the form versus effect distinction this Court condemned in *Apprendi*. *Apprendi*, 530 U.S. at 494, 120 S.Ct. 2348. Thus, however the state chooses to label it, in the end, judges in California may not impose an upper term in the absence of an aggravating factor. When judges do impose an enhanced sentence based on their determination of facts not found by the jury or admitted by the defendant – as the DSL authorizes them to do – they violate the defendant's rights under the Sixth and Fourteenth Amendments.

Upholding the constitutionality of California's DSL would effectively throw the state of this country's sentencing laws into disarray. No longer would the bright-line statutory maximum test have any meaning. Rather, jurisdictions would be free to subvert this Court's *Apprendi* and *Blakely* line of cases, as the California Supreme Court did in *Black*, by simply explaining that their sentencing schemes require their judges to exercise some measure of reasonable discretion. More should be, and is, required to fulfill the guarantees of the Sixth and Fourteenth Amendments.

CONCLUSION

This Court should reverse the decision of the California Court of Appeal and hold that California's Determinate Sentencing Law is unconstitutional to the extent that it permits sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant.

DATED: August 16, 2006. Respectfully submitted,

PETER GOLD
Counsel of Record
2269 Chestnut St., #124
San Francisco, CA 94123
(510) 872-6305

Attorney for Petitioner

FILED
MAY 4 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-6551

In The Supreme Court of the United States

JOHN CUNNINGHAM,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California First Appellate District, Division Five

JOINT APPENDIX

PETER GOLD
Counsel of Record for Petitioner
2269 Chestnut St., #124
San Francisco, CA 94123
(510) 872-6305
(520) 842-6305 (fax)

JEFFREY M. LAURENCE
Counsel of Record for Respondent
Deputy Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102
(415) 703-5897
(415) 703-1234 (fax)

Petition For Certiorari Filed September 17, 2005
Certiorari Granted February 21, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Indictment filed in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0 (Mar. 14, 2001) 2

Jury's verdict in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0 (May 30, 2003) 4

Reporter's Transcript of the sentencing proceeding in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0 (Aug. 1, 2003) 5

Unpublished decision of the Court of Appeal of the State of California, First Appellate District, Division Five in *People v. John Cunningham*, No. A103501 (Apr. 18, 2005) 27

Order modifying opinion and denying rehearing by the Court of Appeal of the State of California, First Appellate District, Division Five in *People v. John Cunningham*, No. A103501 (May 4, 2005) 51

Order denying discretionary review by the Supreme Court of California in *People v. John Cunningham*, No. S133971 (Jun. 29, 2005) 52

Order granting petition for writ of certiorari and motion for leave to proceed in *forma pauperis* by the United States Supreme Court (Feb. 21, 2006) 53

RELEVANT DOCKET ENTRIES

Date	Description
03/14/01	Indictment filed in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0
05/30/03	Jury's verdict in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0
08/01/03	Reporter's Transcript of sentencing proceeding in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0
04/18/05	Unpublished decision of the Court of Appeal of the State of California, First Appellate District, Division Five in *People v. John Cunningham*, No. A103501
05/04/05	Order modifying opinion and denying rehearing by the Court of Appeal of the State of California, First Appellate District, Division Five in *People v. John Cunningham*, No. A103501
06/29/05	Order denying discretionary review by the Supreme Court of California in *People v. John Cunningham*, No. S133971

GARY T. YANCEY, District Attorney
Contra Costa County
John C. Cope, BAR No. 154780
Deputy District Attorney
Courthouse, Fourth Floor
725 Court Street, P. O. Box 670
Martinez, California 94553-0150
Telephone: (925) 646-4500

Attorneys for Plaintiff

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. JOHN E. CUNNINGHAM, DEFENDANT. /	NO. 010396-0 DA NO. X 01 000007-5 INDICTMENT 01) PC 288.5

(Filed Mar. 14, 2001)

The Grand Jury of the County of Contra Costa hereby accuses JOHN E. CUNNINGHAM, Defendant, of the crime of felony, a violation of PENAL CODE SECTION 288.5 (CONTINUOUS SEXUAL ABUSE), committed as follows:

On or about January, 2000 through December, 2000, at San Pablo, in Contra Costa County, the Defendant, JOHN E. CUNNINGHAM, who resided in the same home with and had recurring access to John Doe, who was a minor child under the age of 14 years, from January, 2000, to December, 2000, a period of not less than three months in

duration, did unlawfully engage in three and more acts of lewd and lascivious conduct with the child.

GARY T. YANCEY
District Attorney

/s/ John C. Cope
JOHN C. COPE
Deputy District Attorney

Dated: 3-14-01
at Martinez, California.

* * *

A TRUE BILL

Dated: 3/14/01
at Martinez, California.

/s/ Owen Long
Foreman the Grand Jury of the County of Contra Costa, State of California

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA vs. JOHN E. CUNNINGHAM, Defendant	Department: 35 Docket #:010396-0 VERDICT OF THE JURY

(Filed May 30, 2003)

WE, THE JURY IN THIS CASE, FIND THE DEFENDANT, JOHN E. CUNNINGHAM, GUILTY
NOT GUILTY/GUILTY
OF A VIOLATION OF PC SEC. 288.5, (CONTINUOUS SEXUAL ABUSE), A FELONY AS SET FORTH IN THE INDICTMENT.

DATED: May 30, 2003 [Signature Redacted]
FOREPERSON

VERDICT OF THE JURY

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

HONORABLE **THERESA J. CANEPA**,
JUDGE, PRESIDING

---oOo---

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff,

vs. No. 010396-0

JOHN EDWARD CUNNINGHAM, JR.

Defendant. /

REPORTER'S TRANSCRIPT

DEPARTMENT 35

AUGUST 1, 2003

A.F. BRAY COURTS BUILDING, ROOM 2003

1020 WARD STREET, MARTINEZ, CA.

APPEARANCES

For the People:

ROBERT J. KOCHLY, DISTRICT ATTORNEY

BY: **JOHN C. COPE, ESQ.**

Deputy District Attorney

Contra Costa County

[712] For the Defendant:

LAW OFFICES OF LAWRENCE S. WARD

BY: **LAWRENCE S. WARD, ESQ.**

Attorney at Law

490 7th Street

Oakland, CA 94607

Reported By: RICHARD V. LUNA

CSR NO. 1850

[713] FRIDAY, AUGUST 1, 2003 9:40 A.M.

---o0o---

THE COURT: This is in the matter of People versus John Cunningham.

Appearances, please, Counsel.

MR. COPE: John Cope for the People.

MR. WARD: Larry Ward representing Mr. Cunningham, Your Honor.

THE COURT: All right. And, Mr. Ward, do you waive arraignment for judgment and sentence?

MR. WARD: So waived.

THE COURT: The record will reflect the probation report was timely provided to counsel and you have had it more than the required nine day period; is that correct?

MR. WARD: Yes, Your Honor.

THE COURT: Mr. Cope?

MR. COPE: Yes.

THE COURT: The record should reflect that I have read, received, and considered the Probation Officer's report consisting of 15 pages and that I have further read, received and considered the attachments to the report, letters from the community in mitigation, defendant's sentencing memorandum in mitigation, prosecution's sentencing memorandum in aggravation, the evaluations conducted by Doctors Lundeen and Kincaid, and the letters from the minor victim and his mother.

The defendant has been convicted by jury of violation of 288.5. It appears to the Court that by reason of the provisions of Penal Code Section 1203.066(a)(8), that the [714] defendant is not eligible for probation unless the Court finds to be true all five of the criteria set out in section 1203.066(c).

Counsel, do you agree with that?

MR. COPE: Yes.

MR. WARD: I believe he's eligible for probation notwithstanding the 1203.066 provision because the substantial contacts portion was stricken, and we have then the lewd and lascivious conduct portion of the 288.5. I think that makes him statutorily eligible for probation regardless of the 1203.066.

THE COURT: What is your response to that, Mr. Cope?

MR. COPE: He might make a good point. I'd ask the Court to consider for purposes of this hearing that he is eligible, although I certainly have arguments contrary.

THE COURT: Okay. So, for purposes of this hearing the Court will consider Mr. Ward's argument that

the defendant is eligible for probation based upon the striking of the substantial contacts language, correct?

MR. WARD: True.

THE COURT: All right. At this time, Counsel, would you like to argue or present testimony of some kind or speeches of some kind?

MR. WARD: Yes. I think it's more in the way of a presentation, Your Honor. I don't want to call it an argument.

THE COURT: All right.

MR. WARD: Obviously we are trying to persuade the Court to grant probation, or in the alternative a minimal [715] sentence on this matter.

The Court knows, having sat through the trial, this is a very delicate matter, and even the nature of the charge makes it a very, very delicate matter. I just want to mention as far as the probation report is concerned that the Court saw in my sentencing memorandum the scenario, and I believe it was Ms. Osbourne wrote the report and in contact with me and appeared to be cooperative. Just with Dr. Kincaid's report, I could not get it to her.

I take it the Court having read that would take it in light or supplement to the probation report?

THE COURT: Yes. That's correct.

MR. WARD: And I am going to ask a few people to speak on Mr. Cunningham's behalf.

But before I get to that, I would just like to make comment on the probation report as far as it relates to the

investigation, starting with page 1 of the probation report it's entitled "Investigation."

It appears the probation officer went through a summary, appears maybe police reports and summary of the testimony and she lists by way of investigation a number of acts that are allegedly committed, which I agreed were testified to during the trial.

But when the – I don't know if – I shouldn't say I don't know. My point is that the matter was submitted to the jury for three or more acts of lewd and lascivious conducts and other elements of the 288.5 and the jury came back with a finding of guilty.

[716] But the jury did not make a finding of, you know other than what was related to us as attorneys and the Court, that there were three or more lascivious acts, but not specifically what those acts were.

I'm just questioning the investigation report. It appears that it is saying well, it's true that all of this happened, and I'm just calling the Court's attention to that and that may not necessarily be true as far as the probation report.

Also, under "Evaluation" on page 9, starting with page 9, and I believe about line 17 – and I'm just paraphrasing – I am concerned that the report penalizes John Cunningham because of his consistent denial and setting forth that that allegedly shows a lack of remorse.

I addressed that in my sentencing memorandum as a matter of law under the case of ***People versus Coleman***, 71 Cal.App.2d 1159 and other cases.

As the Court has said, maybe I'm somewhat giving my argument now and then asking for people to be called.

THE COURT: Which is the way I would like to do it.

Would you rather have them speak first and then –

MR. WARD: Why don't we go ahead and have them speak now. I tried to get a list of, list of persons who wished to speak.

I guess well [sic] start with Mr. Stuart Welch. Take the podium and give your name to the Judge and any other information she would like, and what you would like to say.

MR. WELCH: Stuart. S-t-u-a-r-t. Welch. W-e-l-c-h.

[717] THE COURT: Go ahead, Mr. Welch.

MR. WELCH: I would just like to speak for Mr. Cunningham. I've known him going on close to 13 years. We were both police officers together while he was in Richmond, I was in the city of Pittsburg.

And since the accusations came forth he's also worked for me in private security. I've known him closely for a number of years, and all the time that we have spent together, whether that was taking trips, business meetings, conferences, or whatever, I've always known him to be an excellent father with his children. Never seen any improprieties at all.

I, myself, have three children, and he spent considerable amounts of time with them. I have seen him mingle so to say with other people's children, whether at church

or in a social function, and I have never seen nor heard anything improper.

And I believe that the amount of time that we have spent together, that I would have either seen, heard or thought of something in that regards. Same amount of training that was brought out in the trial with Mr. Cunningham's background and experience I would think myself, as an experienced investigator, police officer for a number of years, that I would have picked up on something, and I never seen that and I never observed any kind of conduct like that.

And I would just like to say that I could talk forever, but I don't want to hold the Court's time and other people together. I just known him for years as an upright man, true and to his word and all those thing. I have never seen [718] or heard anything.

THE COURT: Thank you, Mr. Welch.

MR. WARD: Your Honor, there are a total of four persons.

THE COURT: All right.

MR. WARD: Next would be Marcus Ashley.

Mr. Ashley, give your name to the Court and what you are presently doing as far as school or occupation.

MR. ASHLEY: My name is Marcus Ashley. I'm currently a student at the University of California, Berkeley.

I'd like to pretty much speak on John's behalf and say that the things that he been accused of, in all my time dealing with him and being involved and having him

involved in my life, never seen this type of character and I don't believe it to be true.

You know, he deals with kids such as myself, because my life hasn't always been what it is now. I have been a troubled young teen before in my lifetime and be in a group home for two years and still made it to where I am. But I grant that mostly to him and say his involvement in my life made a big difference.

And I just, you know, I just find the things that he has been accused of to be something that is no evidence in his character, and he pretty much deals with kids like myself on a daily basis and he has only a positive impact on their lives.

I wouldn't say anything other than that.

THE COURT: Thank you, Mr. Ashley.

MR. WARD: Next, Laquita McCoy.

[719] Ms. McCoy, state your name for the record and what capacity, like work, what you do.

MS. McCOY: My name is Laquita McCoy. I work in accounts payable.

I have been knowing John Cunningham for a while now. We spent a lot of time together, go to church and go out, and kids intermingle with each other quite a bit. Again I have never seen any type of anything to even insinuating something like this could have occurred.

For the most part I just want to say he is a wonderful father, wonderful person, and definitely a God fearing man, and I just believe that this couldn't have happened.

All I can say, he's really a good person and good disciplinary person, and he's wonderful uplifting person to have in your life.

THE COURT: Thank you, Mr. [sic] McCoy.

MR. WARD: The last speaker, Your Honor, would be Pastor Scott.

Would you give your name to the Court, state your name and capacity.

PASTOR SCOTT: My name is Melvin Scott, Pastor Melvin Scott.

I have been knowing John Cunningham for countless number of years. He has traveled with me. He was my arm bearer, adjutant to me in New York, Philadelphia, Texas. Wherever we go he would accompany me.

Very mannerable conduct, excellent. Every church we [720] went to or state function, people loved him. I have licensed him as a minister, ordained him as elder in the church. His conduct at my church, they all love him. Children love him.

We have had, also had opportunity of living across from each other, about four, five years in the same complex. Children would always be at John's house. That was the hangout. They all showed love and respect to him, and I find him – I don't want to sound redundant in the same thing. We all believe that these accusations against him are not true, but yet the King's heart's in God's hands and God will prevail.

I want to say to you that we all love John and know John, being myself, being very mannerable, very respectful, excellent teacher and speaker at the church and different places we go. So, we just try and believe God for the best for him, because he is a beautiful young man. Thank you.

THE COURT: Thank you.

MR. WARD: Your Honor, that would be all the speakers, presentation as far as persons speaking on John's behalf.

Just for the record, there are approximately 20 people here who are in support of John and I've talked to several of them and they would, if called to say something they would say, it would be consistent with what has just been said to the Court.

I am again mindful that the Court does have my sentencing memo, therefore, I am not going to belabor. But, of course, as the Court knows – and this is a very important time to John Cunningham. And the character letters speak to that.

[721] Doctor Kincaid's report sets forth although he denies the allegation, there are certain other aspects though that can be worked on as far as treatment is concerned and that he would be amenable to treatment. I believe Dr. Kincaid stated in his report one does not have to admit to be amenable to treat one.

With – I think it's Dr. Lundeen's report, this is the report that was submitted pursuant to the 288.1 request by the Court. And even Dr. Lundeen sets forth that he is not a danger, does not appear that he is a danger to the

community. And that is consistent with Dr. Kincaid's report.

Doctor Lundeen does allude to the fact that since he is in denial his treatment is of no help to him. And plain reading of the language is, in Dr. Lundeen's report, it appears that treatment would not be if he is in denial. But Dr. Kincaid sets forth he can benefit by treatment.

In summary, there is something, I always say to myself. There's nothing more tedious than an accounting of the obvious. And the obvious position of defense counsel would be that here we have had a man who but for this conviction – and I can't belittle this conviction – has led an admirable life. One that his mother has been proud of, the family, colleagues, associates have been proud of.

Punishment is an aspect of our current law, I guess the major, main premise, whereas in past time rehabilitation. Looking at the punishment aspect we have a man here who has now been incarcerated now for about 60 days – 64 days he tells me. And I do believe he's an appropriate candidate for probation.

288.5 is a terrible conviction. But when we look at [722] punishment, yes, let us punish. I think he has been so punished now by having to have people who love him, people who care for him have to see him in this position, that a grant of probation would not be out of the question.

I believe there are factors in mitigation as set forth – if we look at Dr. Kincaid's report, he is amenable to treatment. If we look at Dr. Lundeen's report, he is amenable to treatment.

So, in summary we are asking the Court to look at punishment, but also look at is there a great probability of

rehabilitation as far as Mr. Cunningham is concerned? He has the support of his family, support of the community and those members who have come here and I believe that if given the opportunity he would restore his credibility and be a citizen that everyone could be proud of henceforth.

I'm aware of John Doe. You know, I sat here through the testimony, I sat here through the trial. And obviously the jury believed – it was a credibility issue and the jury believed John Doe.

But in Mr. Cope's sentencing memo he alludes to the fact that the child was vulnerable; that my client was in a position of trust or care as a parent. I think those are all included elements though in 288.5.

And obviously I'm addressing any factors in aggravation that the legislative intent in setting forth the elements was to take those into consideration. So, the Court obviously, in my opinion, also should not aggravate because of those if the Court finds those to be true.

[723] So, in summary I'm asking the Court to in essence, if there's punishment, yes, punish. But he's been punished greatly so far. But look at the rehabilitative aspect of this and consider probation.

THE COURT: Thank you, Mr. Ward.

Mr. Cope.

MR. COPE: Thank you. And I won't take too long and I won't repeat – I'll attempt not to repeat what I have already written to the Court in my memorandum.

I would like to point out that there are people here that have their beliefs and are on Mr. Cunningham's side and always will be. And I could – obviously you received letters from the victim and his mother, and there are people on the other side who could come before the Court.

But really the only opinions that matter, I believe, is the collective opinion of 12 impartial people. This is past the point of accusation. This is past the point of possibly this happened to this young man. This has been proven. Defendant's been convicted.

And anyone, certainly anyone who's impartial who sat in this courtroom and listened to the testimony would have no doubt as to that. Anyone, especially anyone impartial who listened to Mr. Cunningham's testimony would know without any doubt that he lied. He lied to the Court, he lied to the police, he lied to the jury. I have no doubt he's lied to his lawyer, lied to his family. That he's lied to the DA investigator and he lied to these two doctors that came and interviewed him.

[724] Now, I'm not asking the Court to punish for that lying. I'm only asking the Court to recognize that he's lied, and how can an opinion from a doctor based on those lies, amenable to treatment, be reliable? It's only as reliable as the information that the doctors got, and that is not reliable.

And there can – this is not just beyond a reasonable doubt. Anyone who sat in this courtroom would know that unfortunately – and I wish it weren't true, I wish none of this happened to John Doe, but it's undeniable.

Factors in aggravation and factors in mitigation are factors the Court should consider in granting probation.

Under the rules of Court it requires a qualitative analysis as well as a quantitative analysis.

If there are some factors in aggravation, the Court doesn't say there are three aggravation, three in mitigation, therefore, I am going to give the mitigated term. The Court can assign whatever weight it believes necessary to whatever factors in aggravation or factors in mitigation that the Court believes is appropriate.

In this case there are numerous factors in aggravation and I cited them in my points, I believe those factors in aggravation, the weight of them is so great in this case that it mandates a maximum sentence.

Part of the purpose of the Court's sentencing is to send a message to the defendant by way of punishment. It's also to send to message to society by way of deterrent, and I believe inherent in those the responsibility of the Court is to send a message to society about what the defendant did and how [725] serious our society takes that crime.

I think its important that we send the defendant a message that he committed the most despicable crime possible by a father. This crime of 288.5 could be perpetrated by a relative or friend who has recurrent access to a victim by simply touching a child in a sexual manner over the clothing. That would be the kind of minimum type of offense that could be done three times and qualify under this Penal Code Section.

Counsel suggested that we should for purposes of sentencing assume the minimum happened in this case, because we don't really know what the jury found other than that he was guilty of this charged crime. I don't think that is accurate. The Court heard the testimony. The only

types of activity that the jury could have based its conviction on were horrendous acts and numerous.

Even counsel in closing argument argued if you belief [sic] John Doe, if you find – in order to find defendant guilty you have to believe this happened hundreds of time. Well, they came back and said yes, that is what we believe, hundreds of times.

What types of acts are we talking about? I don't even want to say it in court. The Court knows what I am talking about. We are talking about horrendous things, not simple touchings. Penetration in the worse possible way, in the most despicable manners, and by someone who ought to be trusted, by the boy's own father.

It's impossible to imagine a situation in which this crime could be committed in any more aggravating way than the [726] way it was done in this case. I ask the Court to send a message in this Court's sentence to the defendant, to his family, to society, and probably most important to send a message to that little boy who is going to be a man. The message is good daddies don't do this, bad dads do this, and it's the worst possible thing that a dad could do, and, therefore, we are giving him the worst possible sentence. Thank you for your time.

MR. WARD: Your Honor, could I just say one more thing –

THE COURT: Yes.

MR. WARD: – and then submit it?

John Doe's mother in her letter to the Court sets forth – page 3 of her letter – "even though his father has been convicted, he doesn't want him to go to jail because he

loves him and doesn't want his father and brothers and sisters to be mad and hate him. He misses them."

I'm asking again the Court to consider probation and also what John Doe's wishes were.

THE COURT: All right. I understand that the victim is not present. I did receive a letter from him and from his mother.

So, other than that, is there any legal cause, Counsel, why judgment should not be pronounced?

MR. WARD: No, Your Honor.

THE COURT: Mr. Ward, do you waive formal arraignment for pronouncement of judgment?

MR. WARD: So waived.

[727] THE COURT: All right. Defendant has been convicted of a violation of Penal Code Section 288.5. The Court appointed Dr. Lundeen, a qualified clinical psychologist, to examine the defendant pursuant to Penal Code Section 288.1 and for him to include a consideration of the factors specified in sections 1203.066(c)(2), (3), and (5). The Court has read and considered such report.

The defendant was also examined by Dr. Kincaid, a clinical psychologist, at his own expense. The Court has read and considered such report.

Defendant has been convicted of a violation of Penal Code Section 288.5, and the allegation pursuant to section 1203.066(a)(8) having been found true, the Court does not find that all of the criteria set out in section 1203.066(c) are true.

The criteria are the following: One, whether the defendant is the victim's natural parent. That is true.

Two, whether a grant of probation to the defendant is in the best interest of the child. The Court finds that not to be true, and that is based on the fact that the child currently lives out of state with his natural mother and is not having contact with the defendant.

Number 3, whether rehabilitation of the defendant is feasible, and defendant is amenable to undergoing treatment. The Court finds that is not true. That is based primarily upon the reports submitted by Doctors Kincaid and Lundeen.

Four, whether the defendant is removed from the household of the victim until the Court determines that the [728] best interests of the victim would be served by returning the defendant to the household of the victim. The Court finds that is not true. While correct, the defendant is removed from the household of the victim, the Court does not believe there is any point at which point the defendant would be returned to the household of the victim.

And, No. 5, whether there is no threat of physical harm to the child victim if probation is granted. The Court finds that is not true, and that is based upon the nature of the threats posed by the defendant to the victim during the period of substantial sexual abuse.

Since all of the above factors are not true, probation is hereby denied.

As to the count charged in the Information, the sentencing range is six, twelve or sixteen years.

The Court has considered the mitigating factors relating to the crime as set out in Rule 4.423(a) and finds none.

The Court has considered and finds the following mitigating factory [sic] relating to the defendant as set out in Rule 4.423(b), and that is that the defendant has no prior record of criminal conduct.

The Court considers and finds the following aggravating facts relating to the crime as set out in Rule 4.421(a). The crime involved great violence, great bodily harm, the threat of great bodily harm and acts disclosing a high degree of viciousness and callousness; the victim was particularly vulnerable due to his age and his dependence upon [729] the defendant as his biological father and primary caretaker.

The defendant threatened to commit bodily injury upon the victim in an attempt to coerce the victim to recant his statement about the crime, and the defendant took advantage of a position of trust or confidence to commit the offense in that he is the biological father of the victim and the sole caregiver of the victim for a substantial period of time.

The Court also considered and finds the following aggravating facts relating to the defendant as set out in Rule 4.421(b). Defendant has engaged in violent conduct which indicates a serious danger to society.

The Court has also considered other circumstances in aggravation as permitted by Rule 4.408. That is defendant had been a peace officer for many years at the time he committed these acts which violated his sworn duty to

serve the community of which his minor son was a member.

As both counsel knows, the Court heard all of the testimony and I found the testimony of the minor child to be credible and compelling. His testimony was consistent from his initial statement to the social workers, to the time that he testified in court. It was as dramatic as it was horrific.

I also heard and evaluated the testimony of the defendant. I found his testimony to be inherently incredible, inconsistent in the retelling, and most importantly shocking is his attempt to blame a minor child for the sexual acts which occurred.

As to the Count charged in the Indictment, the Court finds that the circumstances in aggravation outweigh the [730] circumstances in mitigation. Therefore, the Court is imposing the upper term of imprisonment. The base term for the charged count is 16 years.

I find that the following Rule 4.410 sentencing objectives are applicable: Protecting society, punishing the defendant, deterring others from criminal conduct by demonstrating its consequences, and preventing the defendant from committing new crimes by isolating him for the period of incarceration.

Mr. Cunningham, it is therefore the judgment and sentence of this Court that you shall be imprisoned in the state prison for 16 years.

As you have been convicted of a violation of Penal Code Section 288.5, you are therefore ordered to register pursuant to Penal Code Section 290(a)(1). You are ordered to provide two specimens of blood, a saliva sample, right

thumbprint and full palm, print impression of each hand for law enforcement analysis pursuant to Penal Code Section 296(a)(1). You will be included in the State's DNA and Forensic Identification Data Base and Data Bank Program.

As you have been found guilty of this violation and the victim was under 18 years of age, pursuant to Penal Code Section 1202.05 it's ordered that you have absolutely no visitation with the victim. The clerk is to give notice to the Department of Corrections, the victim's mother and the child victim.

Also, because you have been convicted of this violation you are ordered to submit to a blood or oral mucosal [731] transudate saliva test pursuant to Penal Code Section 1202.1.

You must also paid [sic] restitution costs to be determined pursuant to 1203.1g and 1202.4(a) for the medical and psychological expenses for the sexual assault on the minor.

The Court has determined the amount of the restitution fine pursuant to the formula set out in Penal Code Section 1202.4(b)(2), which is equivalent to $3,200. The Director of Corrections may Collect this restitution from the defendant's earnings in prison.

Pursuant to Penal Code Section 1202.45 the Court is imposing an additional parole revocation restitution fine in the same amount as that just imposed. The payment of this fine is suspended and remains suspended unless your parole is revoked.

The law permits an award of conduct and worktime credits up to one third of the sentence imposed by the Court. The calculation of credits will be determine [sic] by

the Department of Corrections. The presentence credits of 69 actual days have been determined by the Probation Department.

As the defendant has been convicted of a sex crime described in Penal Code Section 667.5(c,) then pursuant to Penal Code Section 3000(b)(1), the defendant will be on parole for a period not exceeding five years following release from prison. Any parole violation time, either because defendant has absconded or were [sic] in custody will not be counted toward the parole period.

Mr. Cunningham, you have the right to appeal from this sentence. If you wish to appeal you must file a written [732] notice of appeal with the clerk of this Court within 60 days from today. If you appeal and are unable to hire a lawyer, the Appellate Court will appoint a lawyer to represent you on appeal at no cost to you. You will also have a right to a free transcript and record of the necessary proceedings in this court. The written notice of appeal must be timely filed.

Do you have any questions about how you appeal?

MR. WARD: I don't believe he has, Your Honor.

We would like to file with the Court, if permitted, [sic] notice of appeal.

THE COURT: Yes, we will permit that.

According to the clerk it should go down to the clerk's office, Mr. Ward, and file that today.

MR. COPE: Your Honor, if I may interject. I believe there is a limit on the conduct credits in a case like

this to 15 percent. I think the Court said one-third. I think it's limited to 15 percent conduct credit, to make that clear.

THE COURT: Thank you, Mr. Cope.

At this time if your bail has not been exonerated it is now exonerated. You are remanded to the custody of the Sheriff of Contra Costa County. The sheriff is ordered to deliver you to the custody of the Director of Corrections of the Reception and Guidance Center at Chino, California.

All right. Thank you.

(Matter adjourned)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

2005 WL 880983

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOHN CUNNINGHAM,** **Defendant and Appellant.**	**A103501** **(Contra Costa County Super. Ct. No. 010396-0)** (Filed Apr. 18, 2005)

John Cunningham (appellant) appeals his conviction by jury trial of continuous sexual abuse of a child under age 14. (Pen. Code, § 288.5.)[1] On appeal he contends the trial court erroneously admitted the victim's hearsay statements, imposed the upper term, and based the upper term on aggravating factors not found by the jury in violation of his right to jury trial under *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531]. We reject these contentions and affirm.

BACKGROUND

Victim's Testimony

The victim, referred to at trial and herein as John Doe, is appellant's son. Doe, born in August 1989, testified that he lived with his mother, Wanda, for the first 10 years

[1] Appellant was sentenced to 16 years in state prison.

of his life. In December 1999, when Doe was 10 years old, he went to live with appellant, appellant's girlfriend, Latasha, appellant's and Latasha's baby, and Latasha's young nephew.

Doe admitted that prior to moving in with appellant, Doe falsely accused his stepfather of beating him, resulting in scars on his back, because he wanted to live with appellant and did not like his new stepfather. After appellant took Doe to the hospital Doe admitted he had lied. Doe also admitted that when he was eight years old he called the telephone number for Boys' Town and falsely reported that there was no food in his mother's house and she did not provide him with enough attention. The police and child protective services investigated the call and found Doe was healthy and had ample food at his house.

Doe testified that in January 2000, shortly after he moved in with appellant, appellant began forcibly sodomizing him and forcing him to orally copulate appellant. Sometimes while being sodomized by appellant, Doe screamed for help because it hurt "very bad" and appellant put his hand over Doe's mouth to stop Doe from screaming. The acts occurred in appellant's bedroom, the living room, the bathroom and the shower. Sometimes appellant molested Doe when he was angry with Doe. Because appellant threatened to kill Doe if he told anyone about the abuse, Doe was afraid of appellant and did not tell anyone while living with him. In December 2000, Doe first told his younger cousin, Brittany, about appellant's abuse in a note while visiting her when appellant was out of town. Before giving her the note Doe said "I have to tell you," but did not want to say it aloud. The note said, "my dad is hu[m]ping me." Thereafter Brittany showed the note to her mother, Karla, who then questioned Doe as to

what it meant. Doe told Karla about appellant's repeated incidents of sodomy and forcing Doe to orally copulate him. After Karla told her husband, Gerrell, about Doe's allegations, Gerrell talked to Doe, then took him to appellant's house for a family meeting. While there, as Doe was packing his clothes, appellant confronted him while they were alone and said, "In a week you better say you are lying or else I am going to fuck you up."

After Doe reported appellant's abuse to Wanda and his stepfather, Wanda took him to the hospital. The pediatrician who performed a sexual assault examination on Doe testified that the examination revealed no trauma to Doe's anus, consistent with most postsodomy examinations. However, the doctor said that Doe's accounts of how he felt physically during and after being sodomized and orally copulating appellant were consistent with how children report such incidents.

On January 4, 2001, Doe was interviewed by San Pablo Police Officer Jeff Palmieri. Doe told Palmieri that appellant sexually abused him numerous times beginning shortly after he moved in with appellant. On January 8, Kerry O'Malley of the Children's Interview Center (CIC) conducted a videotaped sexual assault interview of Doe.[2] Doe's statements during the CIC interview were consistent with his earlier statements to Palmieri.

On January 5, 2001, appellant agreed to a videotaped interview by Officer Palmieri and Contra Costa District Attorney's Office Inspector Ted Todd.[3] At the beginning of

---

[2] A videotape of the CIC interview was played for the jury and admitted into evidence.

[3] The videotaped interview was played for the jury.

the interview appellant adamantly denied any type of sexual touching of Doe. As the questioning ensued, appellant became more forthcoming in his responses. After two or three hours, appellant admitted that Doe's mouth did make contact with appellant's penis for five seconds while in the shower on one occasion. Appellant also said that Doe was a liar and was manipulative and later said Doe was a homosexual and "can't quit the homosexual behavior."

Defense

Testifying in his own defense, appellant denied ever molesting Doe or any child. He also denied ever threatening to kill Doe or "fuck [him] up." Appellant testified that prior to coming to live with him, Doe had been expelled from school due to behavior problems and was not doing his homework. Other defense witnesses testified that Doe had a history of lying and his allegations against appellant were fabricated because he was unhappy about appellant's requirements regarding chores and homework.

DISCUSSION

I. *Doe's Hearsay Statements Were Properly Admitted*

Appellant contends the court erred in admitting, pursuant to Evidence Code section 1360 (hereafter section 1360), the portions of the videotaped CIC interview which contained Doe's hearsay statements to Brittany and Karla. He contends the error violated his right to due process. Appellant does not argue that the admission of Doe's hearsay statements violated the Sixth Amendment right of confrontation under the rule recently announced in *Crawford v. Washington* (2004) 541 U.S. 36. Since Doe testified

at trial, no Confrontation Clause violation occurred. (*Crawford,* pp. 68-69.)

Section 1360[4] creates a limited exception to the hearsay rule in criminal prosecutions regarding a child's statements describing acts of child abuse or neglect, including sexual abuse. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.) In determining whether child hearsay statements possess the requisite indicia of reliability pursuant to section 1360, subdivision (a)(2), the trial court may consider such nonexclusive factors as: "(1) spontaneity and consistent repetition; (2) the mental state

---

[4] Section 1360 provides, in relevant part:

"(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

"(1) The statement is not otherwise admissible by statute or court rule.

"(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

"(3) The child either:

"(A) Testifies at the proceedings.

"(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.

"(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

"(c) For purposes of this section 'child abuse' means an act proscribed by Section . . . 288.5 of the Penal Code. . . ."

of the declarant; (3) use of terminology unexpected from a child of [similar] age; and (4) lack of motive to fabricate. [Citation.]" (*People v. Eccleston* (2001) 89 Cal.App.4th 436, 445; *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1330, citing *In re Cindy L.* (1997) 17 Cal.4th 15, 29-30.) Although courts have considerable leeway in their consideration of appropriate factors, the "'unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.' [Citation.]" (*Roberto V.*, at p. 1374.)

Appellant relies on *Lilly v. Virginia* (1999) 527 U.S. 116 and *People v. Eccleston, supra,* 89 Cal.App.4th 436 to argue we are to exercise de novo review over the trial court's reliability determination. This argument rests on a misunderstanding of the cited authorities. At the time section 1360 was enacted (1995), the leading case on the interpretation of the Confrontation Clause was *Ohio v. Roberts* (1980) 448 U.S. 56.[5] *Roberts* had held that the prosecution could only introduce hearsay against a criminal defendant if the statement was admitted under a firmly rooted hearsay exception or had sufficient indicia of reliability. (*Id.* at p. 66.) Since section 1360 is not a firmly rooted hearsay exception, an accused could argue under *Roberts* that a statement admitted under this section lacked the reliability required by the statute and by the Constitution. While the deferential abuse of discretion standard of review is applied to the statutory finding (*People v. Roberto V., supra,* 93 Cal.App.4th at p. 1367; *People v. Brodit, supra,* 61 Cal.App.4th at pp. 1329-1330),

---

[5] During the pendency of this appeal, the United States Supreme Court rejected the *Roberts* analysis in *Crawford v. Washington, supra,* 541 U.S. 36.

the stricter de novo standard of review is applied to the reliability finding under the Confrontation Clause (*Lilly,* at pp. 136-137; *Eccleston,* at pp. 445-446). Since only the statutory finding of reliability is at issue here, we apply the abuse of discretion standard. In doing so we review the trial court's ruling based on the evidence before the court at the time of the ruling. (See, e.g., *People v. Box* (2000) 23 Cal.4th 1153, 1195; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 176.)

In this case, prior to trial, appellant filed a written motion in limine seeking to exclude portions of Doe's videotaped CIC interview on the basis that they did not qualify under section 1360. At the initial hearing appellant also objected to admission of Doe's incriminating statements to Brittany and other adult relatives prior to the videotaped interview.[6] The parties stipulated that the court would review the CIC interview video and sections of the police reports submitted by the prosecutor, which describe the subject statements by Doe to determine whether the statements provided sufficient indicia of reliability to be admitted under section 1360. Thereafter the court reviewed the CIC interview videotape, a transcript thereof, a police report, and a supplemental police report,[7] after which it ruled Doe's hearsay statements admissible.

---

[6] We note that appellant's objection failed to specify which adult relatives were referred to. However, the relatives were identified in the police reports and the CIC videotape the court considered in ruling on the motion.

[7] The police reports and transcript of the CIC interview were introduced solely for purposes of the section 1360 motion, and were not admitted into evidence.

A. *The Police Reports*

1. *Initial Report*

Officer Palmieri's initial report states that in his January 4, 2001 interview, Doe said that during the first molestation incident appellant made Doe touch appellant's penis and then "whipped" Doe on the buttocks with his hand for not doing his homework. Throughout the year 2000, appellant made Doe orally copulate him in the living room of the residence and appellant sodomized Doe several times while in the bathroom. Doe referred to appellant's penis as his "dingling" or "dick," and said appellant used Vaseline or oil before sodomizing him. Doe said that in December 2000 he "got in trouble by [appellant]" regarding a book report after which appellant whipped him on his buttock and had him orally copulate appellant. Two weeks before Christmas appellant sodomized him in the shower causing him great pain. Doe described having to use the bathroom after being sodomized and seeing a white film in the toilet water. He said the oral copulation and sodomy happened almost every day that he was alone with appellant. He admitted lying several times to his parents, but was adamant that his accusations regarding appellant were not lies, and he was visibly upset. When Palmieri asked why Doe was crying, he said he did not want to get anyone in trouble, loved appellant and wanted appellant to stop molesting him. Doe told Palmieri that on January 2, 2001, he looked Brittany in the eyes and told her appellant was molesting him. After Brittany told Karla, Karla confronted Doe and he told her about appellant's abuse over the last year. Doe also told Palmieri that when Karla took him back to appellant's house to confront appellant with Doe's allegations, appellant, while alone with Doe told Doe that if he did not say the allegations

were a joke, he would "fuck him up." Doe also told Palmieri he did not tell anyone about the abuse for a long time because appellant threatened to kill him if he told anyone.

2. *Supplemental Report*

Officer Palmieri's supplemental report states that on January 9, 2001, he telephoned Karla and Brittany. Brittany told him that on the afternoon of January 2 while she and Doe were drawing, Doe told her he had something important to tell her but did not want to say it out loud. Doe wrote down that appellant had been "humping" him. When Brittany asked Doe if he was telling the truth, he looked her in the eyes and responded affirmatively. Brittany believed Doe was telling the truth because before he wrote the note he was "happy," and when he told her about appellant he started crying. Karla told Palmieri that after Brittany gave her Doe's note she confronted Doe and told him she wanted him to tell the truth. Doe told Karla that appellant had been "putting his dingling in [Doe's] butt," and Doe was also made to put his mouth on appellant's penis. Doe told her the incidents had been occurring for a year, often in the shower, and that appellant put Vaseline or grease "on his butt" before each act of sodomy. Doe told her the last act happened a couple of weeks before because he had not completed a book report.

B. *The CIC Videotape*

When interviewer O'Malley asked Doe if he knew why he was at CIC, Doe responded "so [he] could talk to [her]" "about something that happened to [him]." In response to O'Malley's saying, "Well if you feel comfortable right now, [Doe], could you tell me what happened," Doe gave a

detailed description of the molestation he suffered for a year by a "person" or "him." Doe described appellant's use of Vaseline and the pain he experienced while being sodomized. His description of the first incident of molestation was consistent with Palmieri's police report. Subsequently, when O'Malley asked who "him" referred to, Doe identified appellant. Doe said appellant "humped" him, which Doe said meant "molested." The conduct Doe described as appellant "humping" him constituted sodomy. Doe often referred to appellant's penis as his "private part," but also referred it [sic] as his "ding-a-ling" and his "dick." He referred to having to go to the bathroom after being sodomized as "when I boo-boo." He also said after being sodomized something "white with bubbles" would come out in his stool. Doe described the December book report incident as the last incident of molestation. He said appellant first "whooped him" in the bedroom with a belt, then took him to the living room and had Doe orally copulate him, then took Doe into the bathroom and sodomized him. Doe said he told Brittany because he knew she would tell her mother.

When O'Malley asked Doe how he felt about what happened with appellant, Doe said he felt "shock." Doe said appellant threatened to kill him if he told anyone. Doe said he was afraid to tell anyone because they might not believe him. However, he said he "got tired of him doing it" and "it was disgusting" and told his cousin Brittany to tell her mother. He said he was glad he "brought it out" because he "got sick of it." He said the molestation happened almost every day.

Doe admitted to O'Malley that in the past he had "said some stuff" about his mother that was not true. When O'Malley asked how she would know if he was

telling her the truth, Doe said people know when he is telling the truth. He said Brittany knew he was telling the truth because he looked in her eyes in response to her request to do so and she knew he was telling the truth. He also said he was not laughing when he told Brittany, and that kids laugh when they are not telling the truth. Doe said he cried when talking to Officer Palmieri because he was afraid that Palmieri would not believe him. He was afraid no one would believe him because of his prior lies about his mother and stepfather. He said he previously lied about his mother because he was left alone with no one to talk to and play with. He said he lied about his stepfather because his stepfather would play with his sisters but not with him.

C. *Court's Reasoning Regarding Reliability*

At the subsequent hearing on the in limine motion the court ruled Doe's out-of-court statements admissible, stating the following reasons for concluding that they bore sufficient indicia of reliability: "In terms of reliability, the court finds that the spontaneity of the statements by the minor to his cousin Brittany in the note, knowing his cousin would tell his aunt, and consistent repetition of the manner in which the acts were committed shows the reliability of such statements. [¶] The mental state of the minor is demonstrated by the fact that he came forward because he said he was tired of the abuse. The use of the terminology . . . in which he described the acts is unexpected in a child of similar age. [¶] And to further explain the court's finding . . . the court has read his description of the sexual acts which showed a knowledge of such matters far beyond the ordinary familiarity of a child of his age. [¶] And fourth, the lack of motive to fabricate is demonstrated

by the fact that he was very sorry that he had to tell about these acts because they involved his father and he did not want to have to describe them. [¶] So, based upon those factors the court finds under *Brodit* and *Eccleston* and [section] 1360 that the requirements have been met."

For the following reasons, appellant contends the court erroneously concluded that Doe's hearsay statements were sufficiently reliable to be admissible under section 1360: First, the statements, particularly the note to Brittany, were not spontaneous, but were instead planned. In addition, the statements were not consistent, but were "embellished" and "refined" with each retelling. Second, Doe's mental state at the time of his statements was "unstable" given his prior false accusations against Wanda and Latasha; his animosity toward appellant, Wanda and Latasha; and his behavioral problems at school. Third, Doe's statements did not indicate a level of knowledge that was unexpected for an 11 and one-half year old, and he spent time with older siblings and had access to numerous TV channels with no parental controls. Fourth, Doe had a motive to lie – he wanted to move back to Wanda's house due to his perceived mistreatment by appellant and Latasha. Finally, there was little, if any, evidence corroborating Doe's accusations.

We conclude the court did not abuse its discretion in finding Doe's hearsay statements reliable. Regarding the spontaneity of the statements to both Brittany and O'Malley, Doe's statements were spontaneous in the sense that Doe initiated them. (See *People v. Eccleston, supra,* 89 Cal.App.4th at p. 446.) In addition, his statements to O'Malley regarding appellant's abuse were in response to her neutral question, "could you tell me what happened?" We reject appellant's assertion that Doe's

hearsay statements were not consistently repeated, but were "embellished" and "refined" with each retelling. Doe's initial and very brief statement to Brittany that appellant had been sodomizing him was not inconsistent with his much longer statements to Karla and O'Malley. Doe's statements to Karla and O'Malley were remarkably consistent as to the "general outline of abuse" (*id.* at p. 446), and it is understandable that he imparted extra details of the abuse to the interviewer because of the interview format.

Regarding Doe's mental state, the record is mixed. Although he conceded to O'Malley that he had previously fabricated claims against his mother and stepfather, O'Malley conducted a lengthy colloquy with him regarding truth and falsity and questioned him as to how she would know that he was telling the truth. He also stated that in light of his prior lies he was worried that his allegation of appellant's abuse would not be believed. The court could reasonably conclude that this degree of candor enhanced, rather than detracted from Doe's reliability.

We also reject appellant's assertion that Doe's statements did not indicate a level of knowledge unexpected of an 11 and one-half year old. Doe's extremely detailed descriptions of the unpleasant physical sensations he experienced during and after being sodomized would be unusual even for an adult unless experienced firsthand. Nothing in the record before the court at the in limine hearing suggested that Doe's level of knowledge came from a source other than his personal experience.

Based on the record before the court at the in limine hearing, it could properly determine that Doe lacked a motive to fabricate based on his stated love for appellant,

reluctance to report the abuse and the possibility of appellant's resulting incarceration. Appellant had the opportunity to cross-examine Doe at trial about his perceived mistreatment by appellant and appellant's girlfriend as a motive for fabricating the abuse allegations.

Finally, we reject appellant's assertion that the lack of corroborating evidence suggested that Doe's hearsay statements were unreliable. Corroboration is not necessary where the child victim testifies at trial. (See § 1360, subd. (a)(3)(A).)

After reviewing the police reports and CIC videotape, the court provided a thorough statement of its reasons for finding Doe's hearsay statements reliable. Appellant has failed to demonstrate that the court abused its discretion.

II. *The Court Properly Imposed the Upper Term*

A. *Aggravating Factors*

Appellant next contends the court erroneously relied on five of six aggravating factors in sentencing him to the upper term.[8]

Prior to sentencing, the court appointed psychologist Richard Lundeen, pursuant to Penal Code section 288.1, to examine appellant and submit to the court a written

---

[8] The People assert that appellant has waived this claim because he only objected below to the aggravating factors that the victim was particularly vulnerable and that appellant took advantage of a position of trust. (See *People v. Scott* (1994) 9 Cal.4th 331, 356.) Even assuming the claim is waived, we review it on the merits in the interests of justice and to prevent an ineffective assistance of counsel claim.

report and recommendation.[9] Dr. Lundeen opined that appellant would not be a danger to Doe or other children in the community if released. Regarding treatment, Dr. Lundeen stated "'either [appellant] did not engage in inappropriate sexual behavior as charged, or else he has repressed those behaviors to a depth where he cannot deal with them at a conscious level at this time. In either case, he would be a poor candidate for rehabilitative therapy if he does not have a condition from which he is trying to rehabilitate." Appellant retained psychologist John Kincaid to conduct a psychological evaluation. Dr. Kincaid's report stated that if granted probation appellant would be unlikely to pose a risk to Doe, but it would be prudent to restrict him from direct contact with minors without the immediate presence of a responsible adult. Dr. Kincaid also stated that he saw "little likelihood that [appellant's] incarceration would be a detriment to [Doe], who had lived with him only a relatively brief time." Dr. Kincaid recommended that appellant obtain treatment which would decrease the likelihood that he would reoffend. He also stated that, if incarcerated, appellant should be referred for a mental health evaluation although "offense-specific treatments are almost nonexistent in custody."

Although the probation report did not recommend a particular sentence, it noted the following circumstances in aggravation (Cal. Rules of Court,[10] rule 4.421):(1) "The crime involved great sexual violence and callousness toward a 10-year-old child." In particular, the report noted that the victim was "brutally whipped and sodomized over

---

[9] Dr. Lundeen's report is not included within the appellate record but is summarized in the probation report.

[10] All rule references are to the California Rules of Court.

100 times in a one year period." (2) The victim was particularly vulnerable as he relied on his father, as his custodial parent, for support. (3) Appellant took advantage of his position of parental trust and trust as a police officer to commit the offense. (4) Appellant engaged in violent conduct which indicated a serious danger to children in society. The probation report noted the single mitigating factor that appellant had no prior criminal record. (Rule 4.423)

At sentencing, the court acknowledged that it had considered the probation report, psychological evaluations, sentencing memoranda, letters from the community in mitigation and letters from Doe and his mother. After denying probation, it found the sole mitigating factor was appellant's lack of prior criminal conduct. (Rule 4.423(b).) The court found the following aggravating factors: (1) The crime involved great violence and the threat of great bodily harm disclosing a high degree of viciousness and callousness. (2) The victim was particularly vulnerable due to his age and dependence on appellant as his father and primary caretaker. (3) Appellant threatened to commit bodily injury upon the victim in an attempt to coerce the victim to recant his statements about the crime. (4) Appellant took advantage of a position of trust to commit the crime in that he is the victim's father and sole caregiver for a substantial period of time. (5) Appellant engaged in violent conduct which indicates a serious danger to the community. (6) Appellant was a peace officer at the time he committed the criminal acts, violating his duty to serve the community of which the victim was a member. After finding that the aggravating circumstances outweighed the sole mitigating factor, the court imposed the upper 16-year term.

1. *The Relationship Between Appellant and the Victim*

Appellant contends the court erred in finding the victim was vulnerable due to his age because age was an element of the charged offense. (Rule 4.420(d).) Although the victim's minority cannot be used as an aggravating factor where minority is an element of the offense (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615, disapproved on other grounds in *People v. Scott, supra,* 9 Cal.4th at p. 353, fn. 16), victim vulnerability in this case was also based on the victim's dependence on appellant as his primary caretaker. Thus, the court properly based its vulnerable victim finding on a factor other than the victim's age. (*People v. Garcia* (1985) 166 Cal.App.3d 1056, 1070.)

Appellant next contends the court erred in using the victim's dependence on appellant, and appellant's taking advantage of a position of trust as the victim's father/sole caregiver as two separate aggravating factors. He relies on *Garcia,* which held that the victim's relationship to the defendant could not be used both to support a finding of vulnerability and to find that the defendant took advantage of a position of trust or confidence to commit the offense. "It does appear that these factors are two sides of the same coin. The significant circumstance is the relationship between the defendant and the victim. The circumstances that placed the defendant in a position of trust and confidence were identical to the circumstances which placed the victim in a position of vulnerability." (*People v. Garcia, supra,* 166 Cal.App.3d at p. 1070.) We agree with this analysis and conclude that having used the relationship between appellant and the victim in support of the vulnerable victim factor (rule 4.421(a)(3)), the court

could not use that fact in support of a separate aggravating factor (rule 4.421(a)(11)).

2. *Danger to Society*

Appellant next contends the court's finding that he engaged in violent conduct, which indicated he posed a serious danger to the community (rule 4.421(b)(1)), is not supported by the evidence. We disagree. The fact that appellant repeatedly forcibly sodomized Doe and forced Doe to orally copulate him suggests that the charged offense was a crime of violence. In addition, appellant's retained psychologist, Dr. Kincaid, opined that while a grant of probation would not pose a risk to Doe, it would be prudent to restrict appellant from unsupervised direct contact with minors. In addition, Dr. Kincaid recommended that appellant receive treatment to reduce the likelihood of reoffending. Dr. Kincaid's testimony provides sufficient support for the finding that appellant posed a serious danger to the community.

3. *Great Violence and Great Bodily Harm*

Appellant argues the court erred in using the fact that he threatened the victim both to find that the crime involved great violence and the threat of great bodily harm (rule 4.421(a)(1)) and to find that he threatened the victim in an attempt to coerce the victim to recant the victim's statement about the crime (rule 4.421(a)(6)). Appellant asserts the record is devoid of any violence separate from that deemed to be inherent in the acts of sodomy and oral copulation.

Even assuming the court's reliance on this factor was misplaced, the court properly found multiple aggravating

factors. Sentencing courts have wide discretion in weighing aggravating and mitigating factors, and may balance them qualitatively as well as quantitatively. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) In addition, one aggravating factor alone may warrant imposition of the upper term and the court need not state reasons for minimizing or disregarding mitigating circumstances. (*Ibid.*; accord, *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043-1044.)

4. *Status As Peace Officer*

Finally, appellant contends his status as a police officer was not reasonably related to his sentencing and therefore the court erroneously relied upon it as an aggravating circumstance under rule 4.408(a).[11] In particular, he argues that the abuse he inflicted on the victim was in no way related to his employment as a police officer. Moreover, he argues that his status as a police officer did not make the offense against the victim "distinctively worse than it would ordinarily have been." (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 682.)

Appellant also notes that this case is factually distinguishable from *Brown,* where the defendant's status as a police officer was relied on as an aggravating factor in imposing the upper term on a firearm enhancement. In that case, the defendant shot a fellow officer with whom she was having an affair, and thereafter destroyed evidence. *Brown*

[11] Rule 4.408(a) provides: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge."

stated that the trial court could properly have considered the unusual facts relating to the defendant – that the defendant was a police officer who used deadly force to solve a personal problem, caused serious injury, and thereafter destroyed evidence as an aggravating factor because peace officers are seen as having a duty to protect people, not unlawfully shoot an unarmed estranged lover. (*People v. Brown, supra,* 83 Cal.App.4th at pp. 1043-1044.) We agree with appellant that *Brown* is distinguishable from the instant case.

Again, assuming the court improperly relied on appellant's police officer status as an aggravating factor, the court properly found two aggravating factors and exercised its discretion in balancing them against a single mitigating factor. Appellant has failed to demonstrate that imposition of the upper term was an abuse of the court's discretion.

B. *Blakely v. Washington*

In a supplemental brief filed pursuant to *Blakely v. Washington, supra,* 124 S.Ct. 2531, appellant contends his sentence must be reversed because in imposing the upper term the trial court, and not the jury, made the findings on aggravating factors in violation of his rights to jury trial and due process.[12] The People rejoin, in part, that appellant waived his challenge.[13]

---

[12] The issue of whether *Blakely* precludes a trial court from making findings on aggravating factors in support of imposing an upper term sentence is currently pending in our Supreme Court. (*People v. Towne,* review granted July 14, 2004, S125677.)

[13] The California Supreme Court is currently considering the issue in *People v. Black,* review granted July 28, 2004, S126182.

Under the California sentencing scheme the lower, middle and upper terms constitute a range of authorized punishments for a given crime; the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment. A defendant, such as appellant, who is convicted of continuous sexual abuse of a child under age 14, faces a maximum prison term of 16 years in prison that may be imposed "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2537.) As *Blakely* explained, "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid.*) It is instructive that, in distinguishing between permissible and impermissible schemes, the court in *Blakely* explained: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence – and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury." (*Blakely,* at p. 2540.) Here, the 16-year upper term was the maximum

statutorily authorized sentence for violating Penal Code section 288.5. The court's imposition of that maximum did not violate appellant's rights to jury trial or due process.[14]

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

STEVENS, J.

Jones, P.J., Concurring and Dissenting

I concur with the majority opinion in all respects, except its conclusion that imposition of the 16-year upper term was not unconstitutional. I conclude the case must be remanded for resentencing under compulsion of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*), for the reasons expressed in my dissent in *People v. Picado,* review granted January 19, 2005, S129826, California Rules of Court, rule 28.2(d)(2).

[14] After submission of this case, the United Supreme Court decided *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738] (maj. opn. of Stevens, J.).) *Booker,* in our view, clarifies that *Blakely's* Sixth Amendment concerns are inapplicable to statutory provisions that merely *permit,* but do not compel, the imposition of a particular sentence upon a particular finding of fact. In California, Penal Code section 1170 permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors. (See *People v. Scott, supra,* 9 Cal.4th at pp. 349-350.)

In short, *Blakely* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (*Blakely, supra*, 124 S.Ct. at p. 2538.) It explained that the relevant "statutory maximum" is not the maximum sentence a court may impose after finding additional facts, but the maximum it may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. (*Id.* at pp. 2537-2538.) Under California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).)

In this case, the trial court relied on a number of aggravating factors as the basis for imposing the upper term. Even if the vulnerable victim factor was based on evidence other than the victim's age, I believe that *Blakely* requires a jury finding of this factor. Similarly, the factors that appellant engaged in violent conduct indicating a serious danger to the community, and the crime involved great violence and the threat of bodily harm require a jury finding under *Blakely*. Finally, even assuming the evidence shows that appellant admitted his status as a police officer, I need not reach the question whether this is unrelated to the offense, as appellant contends, because I would remand the case to the trial court to weigh whether this factor alone is sufficient to support the upper term.

United States v. Booker (2005) ___ U.S. ___ [125 S.Ct. 738] (*Booker*), addressing the applicability of *Blakely* to the federal sentencing guidelines, does not alter my conclusion. Justice Breyer's majority opinion severed from the Federal Sentencing Act its provision (18 U.S.C.A. § 3553(b)(1)) that makes the guidelines mandatory. As a

result, the guidelines are now effectively advisory; their use will not implicate the Sixth Amendment, leaving a federal court broad discretion to impose a sentence within the statutory range assigned to a particular offense. (*Booker, supra,* 125 S.Ct. at pp. 750, 757, 764.) By the mandatory language of Penal Code section 1170, subdivision (b), a California court is required to impose the middle term, unless it makes factual findings different from, or in addition to, those inherent in the jury verdict.[1]

Jones, P.J.

[1] Penal Code section 1170, subdivision (b), states: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term,* unless there are circumstances in aggravation or mitigation of the crime." (Italics added.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOHN CUNNINGHAM,** **Defendant and Appellant.**	**A103501** **(Contra Costa County Super. Ct. No. 010396-0)** **ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]** (Filed May 4, 2005)

THE COURT:

It is ordered that the opinion filed herein on April 18, 2005, be modified as follows:

At the end of the last paragraph on page 15, after the sentence ending "upper term was an abuse of the court's discretion," add the following sentence:

> Remand for resentencing is unnecessary since it is not reasonably probable that the court would have imposed a lesser term had it know [sic] that some of its reasons were improper. (See *People v. Price* (1991) 1 Cal.4th 324, 492.)

There is no change in the judgment.

Respondent's petition for rehearing is denied. Jones, P.J., would grant rehearing.

Dated: **May 4, 2005** **JONES, P.J.**

Court of Appeal, First Appellate District,
Division Five – No. A103501
S133971

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOHN CUNNINGHAM, Defendant and Appellant.

(Filed Jun. 29, 2005)

Petition for review denied without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black* (June 20, 2005, S126182), ___ Cal.4th ___, 2005 WL 1421815 <http://www.courtinfo.ca.gov/opinions/documents/S126182.PDF> regarding the effect of *Blakely v. Washington* (2004) 542 U.S. ___, 124 S.Ct. 2531, and *United States v. Booker* (2005) 543 U.S. ___, 125 S.Ct. 738, on California law.

Brown, J., was absent and did not participate.

/s/ George
Chief Justice

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 21, 2006

Mr. Peter Gold
2269 Chestnut Street, #124
San Francisco, CA 94123

Re: John Cunningham
v. California
No. 05-6551

Dear Mr. Gold:

The Court today entered the following order in the above-entitled case:

The motion for petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

(4)

No. 05-6551

FILED
MAY 4 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JOHN CUNNINGHAM,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District, Division Five

BRIEF FOR PETITIONER

PETER GOLD
Counsel of Record
2269 Chestnut St., #124
San Francisco, CA 94123
(510) 872-6305

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
BRIEF FOR PETITIONER	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
A. Federal Constitutional Provisions	1
B. State Statutory Provisions	2
C. State Rules of Court	2
STATEMENT OF THE CASE	3
A. California's Determinate Sentencing Law	3
B. Petitioner's Case	6
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. CALIFORNIA'S DETERMINATE SENTENCING LAW, BY PERMITTING SENTENCING JUDGES TO IMPOSE ENHANCED SENTENCES BASED ON THEIR DETERMINATION OF FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS	13

TABLE OF CONTENTS – Continued

Page

A. *Blakely* And *Apprendi* Require Any Fact, Other Than The Fact Of A Prior Conviction, That Increases The Penalty For A Crime Beyond The Statutory Maximum To Be Submitted To A Jury And Proved Beyond A Reasonable Doubt 13

B. The Determinate Sentencing Law's Procedure For Imposing An Upper Term Violates Defendants' Sixth Amendment Right To A Jury Trial 18

C. The Determinate Sentencing Law's Procedure For Imposing An Upper Term Violates Defendants' Due Process Right To Proof Beyond A Reasonable Doubt 23

D. The California Supreme Court Has Misinterpreted This Court's Precedents In Finding The DSL Constitutional 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) 23

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) ..... *passim*

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) ..... *passim*

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 14, 23

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct 1881, 44 L.Ed.2d 508 (1975) 14, 23

People v. Black, 35 Cal.4th 1238, 113 P.3d 543, 29 Cal.Rptr.3d 740 (Cal. 2005) ..... *passim*

People v. Fernandez, 226 Cal.App.3d 669, 276 Cal.Rptr. 631 (Cal.App. 1990) 5, 19

People v. Garcia, 32 Cal.App.4th 1756, 39 Cal.Rptr.2d 73 (Cal.App. 1995) 6, 19

People v. Lobaugh, 188 Cal.App.3d 780, 233 Cal.Rptr. 683 (Cal.App. 1987) 4, 18

People v. Montano, 6 Cal.App.4th 118, 8 Cal.Rptr.2d 136 (Cal.App. 1992) 4

People v. Simon, 208 Cal.App.3d 841, 256 Cal.Rptr. 373 (Cal.App. 1989) 5, 19

People v. Wright, 30 Cal.3d 705, 639 P.2d 267, 180 Cal.Rptr. 196 (Cal. 1982) 5, 19, 24

People v. Young, 146 Cal.App.3d 729, 194 Cal.Rptr. 338 (Cal.App. 1983) 6, 19

TABLE OF AUTHORITIES – Continued

Page

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) ..... *passim*

Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) 14

State v. Gore, 143 Wash.2d 288, 21 P.3d 262 (Wash. 2001) 15

United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) ..... *passim*

United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) 14, 23

STATUTES

28 U.S.C. § 1257(a) 1

Cal. Pen. Code § 12 ..... 3, 4

Cal. Pen. Code § 18 3

Cal. Pen. Code § 288.5 ..... *passim*

Cal. Pen. Code § 288.5(a) 6, 26

Cal. Pen. Code § 1170(a)(3) 4

Cal. Pen. Code § 1170(b) ..... *passim*

Cal. Pen. Code § 1170.3(a) 4

Wash. Rev. Code § 9.94A.370(2) 15

CALIFORNIA RULES OF COURT

Rule 4.408(a) 5, 8, 19

Rule 4.420 2

Rule 4.420(a) 4, 5, 18, 19, 20

TABLE OF AUTHORITIES – Continued

Page

Rule 4.420(b) 5, 19, 20, 24
Rule 4.420(c) 6, 19
Rule 4.420(d) 5, 19, 20
Rule 4.420(e) 5, 19
Rule 4.421 ..... 5, 19, 22, 30
Rule 4.421(a) 5
Rule 4.421(a)(1) 8
Rule 4.421(a)(3) 8
Rule 4.421(a)(6) 8, 21
Rule 4.421(a)(11) 8
Rule 4.421(b) 5
Rule 4.421(b)(1) 8
Rule 4.421(c) 5
Rule 4.423(b)(1) 8

OTHER AUTHORITIES

Laurie L. Levenson & Alex Ricciardulli, California Criminal Law (2005) 4

BRIEF FOR PETITIONER

OPINIONS BELOW

The unpublished opinion of the California Court of Appeal is reprinted at Joint Appendix ("J.A.") 27-50. The order of the California Court of Appeal denying a rehearing and modifying its opinion is reproduced at J.A. 51. The order of the California Supreme Court denying discretionary review of the Court of Appeal's decision is reproduced at J.A. 51. The trial court's pertinent sentencing orders are reproduced at J.A. 5-26.

STATEMENT OF JURISDICTION

The California Supreme Court issued its order denying discretionary review on June 29, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

B. State Statutory Provisions

California Penal Code § 288.5(a) provides that any person who violates that section "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years."

California Penal Code § 1170(b) provides in pertinent part:

> When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.* . . . In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.

(Emphasis supplied).

C. State Rules of Court

Rule 4.420 of the California Rules of Court provides in relevant part:

> (a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is

ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. *The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.*

(b) *Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence.*

(Emphasis supplied).

All other relevant provisions of the California Rules of Court are reprinted in Appendix D to the petition.

STATEMENT OF THE CASE

A. California's Determinate Sentencing Law

The California Legislature enacted the Determinate Sentencing Law (the "DSL") in 1976, replacing an indeterminate sentencing scheme. Added by Stats. 1976, c. 1139, § 273, p. 5140, operative July 1, 1977, as amended by Stats. 1977, c. 165, § 15, p. 647. Under California's sentencing law, after a defendant suffers a conviction, a judge, not a jury, determines and imposes punishment. Cal. Pen. Code § 12.[1] For most felonies, the judge must sentence the defendant to either a lower, middle, or upper term of imprisonment. *See, e.g.*, § 18 [providing for state prison term of 16 months, two years, or three years for

[1] All statutory references are to the California Penal Code unless otherwise specified.

every felony offense not prescribing different punishment]. Judges have no authority to devise *ad hoc* sentences, or otherwise deviate from the DSL. § 12; *People v. Montano*, 6 Cal.App.4th 118, 123, 8 Cal.Rptr.2d 136, 139 (Cal.App. 1992).

Sentencing judges must impose the middle term unless they find the existence of additional facts which justify a mitigated or aggravated term: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the court shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime." § 1170(b) (emphasis supplied); *see also* Cal. Rules of Court, rule 4.420(a)[2] ["The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation."]; *People v. Lobaugh*, 188 Cal.App.3d 780, 785, 233 Cal.Rptr. 683, 686 (Cal.App. 1987). Thus, under the DSL, the middle term is the presumptive sentence. *People v. Black*, 35 Cal.4th 1238, 1257, 113 P.3d 543, 545, 29 Cal.Rptr.3d 740, 753 (Cal. 2005); Laurie L. Levenson & Alex Ricciardulli, California Criminal Law § 1:20, at 32 (2005).

Judges may depart from the presumptive middle term and impose the upper term only where they find exceptional circumstances in the form of aggravating factors.

---

[2] The DSL provides that "[i]n sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council." Cal. Pen. Code § 1170(a)(3); *see also* § 1170.3(a) [directing Judicial Council to promote uniformity in sentencing by adopting rules for consideration of sentencing judge]. In turn, the Judicial Council has promulgated rules of court "under express authority granted by the Legislature." Cal. Rules of Court, Introductory Statement. "All of the California Rules of Court have the force of law." *Ibid.*

§ 1170(b); Cal. Rules of Court, rule 4.420(b); *Black,* 35 Cal.4th at 1247, 113 P.3d at 538, 29 Cal.Rptr.3d at 744. The DSL allows judges to find such aggravating factors by only a preponderance of the evidence. Cal. Rules of Court, rule 4.420(b); *People v. Wright*, 30 Cal.3d 705, 710, 639 P.2d 267, 269, 180 Cal.Rptr. 196, 199 (Cal. 1982). In the absence of circumstances in aggravation, imposition of the upper term is unauthorized and requires a reversal of the defendant's sentence. § 1170(b); Cal. Rules of Court, rule 4.420(a) & (b); *Black,* 35 Cal.4th at 1260, 113 P.3d at 547, 29 Cal.Rptr.3d at 755, *People v. Simon*, 208 Cal.App.3d 841, 852, 256 Cal.Rptr. 373, 380 (Cal.App. 1989). Although judges need not state reasons for imposing the presumptive middle term, they must state orally on the record their "reasons for selecting the upper or lower term," including "a concise statement of the ultimate facts which the court deemed to constitute aggravation or mitigation justifying the term selected." Cal. Rules of Court, rule 4.420(e); *see also* § 1170(b); *Black,* 35 Cal.4th at 1248, 113 P.3d at 539, 29 Cal.Rptr.3d at 745.

Rule 4.421 sets forth a non-exhaustive list of circumstances which may constitute aggravating factors, including facts relating to the crime, facts relating to the defendant, and "[a]ny other facts statutorily declared to be circumstances in aggravation." Cal. Rules of Court, rule 4.421(a)-(c). Rule 4.408(a) further provides that when making discretionary sentencing decisions, judges may consider "additional criteria reasonably related to the decision being made."

However, judges may *not* use a fact which is an element of the crime as an aggravating factor. Cal. Rules of Court, rule 4.420(d); *People v. Fernandez,* 226 Cal.App.3d 669, 680, 276 Cal.Rptr. 631, 637 (Cal.App.

1990). Similarly, even where a fact is not technically an element of the underlying crime, judges still may not rely upon it as an aggravating factor where the fact is inherent in the crime. *See, e.g., People v. Young,* 146 Cal.App.3d 729, 734, 194 Cal.Rptr. 338, 341 (Cal.App. 1983) [judge improperly relied upon "extreme serious nature of the offense" to aggravate defendant's sentence for assault with a deadly weapon since this offense is "obvious[ly]" an extremely serious offense]. The DSL also prohibits judges from imposing the upper term based on a fact charged and found true as a sentence enhancement unless the judge first strikes the punishment associated with the enhancement. § 1170(b); Cal. Rules of Court, rule 4.420(c); *People v. Garcia,* 32 Cal.App.4th 1756, 1777, n.15, 39 Cal.Rptr.2d 73, 85, n.15 (Cal.App. 1995). Consequently, in finding the existence of factors in aggravation, sentencing judges necessarily rely on facts *beyond* those inherent in the jury's verdict or the defendant's guilty plea.

B. Petitioner's Case

On March 14, 2001, the State filed an indictment charging petitioner with one count of continuous sexual abuse of a child in violation of California Penal Code § 288.5. J.A. 2-3. Section 288.5 provides that anyone convicted of this offense "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." § 288.5(a).

Petitioner was a police officer. Reporter's Transcript ("R.T.") 243, 350. His son, John Doe, lived with his mother for the first ten years of his life. R.T. 45. Doe had a history of telling lies. R.T. 50, 90, 172, 183, 190, 271, 360-362, 402. When Doe was eight, he called a boys' home in Nebraska

and falsely reported that his mother did not return from work until 8:00 p.m. or 9:00 p.m. and the house had no food in it. R.T. 49-50, 83, 86, 90. This was his way of getting back at his mother. R.T. 271.

At age ten, Doe decided that he wanted to live with petitioner. R.T. 48. In order to accomplish this, he told petitioner and the police that his step-father beat him, causing injuries to his back. R.T. 49, 91, 93, 95, 152, 192. Investigation revealed that the scars on Doe's back were old and that he had lied. R.T. 49, 95, 141. Thereafter, Doe admitted fabricating the beatings in order to cause a move into petitioner's home. R.T. 49, 95.

Despite his lies, Doe moved in with petitioner in December of 1999. R.T. 49-50, 142. According to Doe, shortly thereafter petitioner began sexually abusing him. R.T. 50. Doe alleged that over the course of approximately ten months, petitioner committed numerous acts of molestation, sodomy, and oral copulation against him. R.T. 52-55, 58-61, 64. At some point, Doe wanted to move out of petitioner's home. R.T. 66, 102. He told various relatives that petitioner had abused him, and eventually returned to live with his mother and step-father. R.T. 67, 73, 143, 196, 205. Doe claimed that petitioner told him, "You come back I am going to F you up." R.T. 72.[3]

Petitioner denied Doe's accusations of sexual abuse. R.T. 506-507, 543, 548. Petitioner and other relatives of Doe suggested that Doe levelled these allegations because he was angry with petitioner for disciplining him and

---

[3] Petitioner's sister-in-law reported that according to Doe, petitioner told him, "In a week you better say you are lying or else I am going to fuck you up." R.T. 208.

requiring him to do chores, and because he wanted to return to his mother's home. R.T. 437-438, 451, 461, 463, 523-524, 528, 579.

On May 30, 2003, the jury convicted petitioner as charged, stating in its verdict form that it found petitioner guilty of "a violation of PC Sec. 288.5, (continuous sexual abuse), as set forth in the indictment." J.A. 4. The jury made no other factual findings.

The trial judge sentenced petitioner on August 1, 2003. J.A. 5-26. The judge found the existence of six aggravating factors pursuant to California's Rules of Court: (1) great violence, great bodily harm, and threat thereof disclosing a high degree of viciousness and callousness (rule 4.421(a)(1)); (2) a vulnerable victim due to his age and dependence on petitioner as his father and primary caretaker (rule 4.421(a)(3)); (3) a threat of bodily injury to coerce the victim to recant (rule 4.421(a)(6)); (4) taking advantage of a position of trust or confidence as the victim's father and caregiver (rule 4.421(a)(11)); (5) engaging in violent conduct which indicates a serious danger to society (rule 4.421(b)(1)); and (6) employment as a police officer (rule 4.408(a)). J.A. 22-23. The judge found one mitigating factor: petitioner's lack of any prior record (rule 4.423(b)(1)). J.A. 22.[4] Finding that the factors in aggravation outweighed the factor in mitigation,

---

[4] At the sentencing hearing, four people spoke to petitioner's good character and regard in the community, and twenty more people were present and willing to speak on his behalf. J.A. 10-14. Defense counsel argued that petitioner's amenability to treatment and support from his family and community made him an excellent prospect for rehabilitation. J.A. 15-16. Counsel also objected to the factors in aggravation, including John Doe's vulnerability and petitioner's position of trust as his parent since those factors were elements of the section 288.5 conviction. J.A. 16.

the judge departed from the presumptive middle term of 12 years and sentenced petitioner to the upper term of 16 years in state prison. J.A. 23.

In a split decision, the California Court of Appeal affirmed petitioner's conviction and sentence. J.A. 27-50. Specifically, the appellate court rejected petitioner's contention that he was deprived of his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process because the trial court imposed the upper term of 16 years by relying on aggravating factors neither found true by a jury nor beyond a reasonable doubt. J.A. 46-48. The court found that under California's DSL, "the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment." J.A. 47.[5] Presiding Justice Jones dissented from this portion of the majority's opinion, concluding that *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), compelled a remand for resentencing since "[u]nder California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term." J.A. 49.

---

[5] In a separate portion of its opinion, the Court of Appeal (1) found that the trial court had erred in finding petitioner took advantage of a position of trust or confidence; (2) assumed that the trial court "misplaced" its reliance on the crime involving great violence or great bodily harm; and (3) also assumed that the trial court improperly relied on petitioner's employment as a police officer as an aggravating factor. J.A. 43-46. The appellate court further determined that "the [trial] court properly found two aggravating factors and exercised its discretion in balancing them against a single mitigating factor." J.A. 46.

Petitioner sought discretionary review of this issue in the California Supreme Court. While his petition for review was pending, the California Supreme Court decided *People v. Black,* 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (Cal. 2005), ruling that criminal defendants have no federal constitutional right to a jury trial on aggravating factors used to impose an upper term sentence under the DSL. Thereafter, the California Supreme Court issued an order denying discretionary review in petitioner's case, "without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black*. . . ." J.A. 52. *Black* became final on August 31, 2005, with no change in the opinion. *See Black,* 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740.

On February 21, 2006, this Court granted certiorari in petitioner's case. J.A. 53.

SUMMARY OF ARGUMENT

In *Blakely v. Washington,* 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), this Court confirmed that any fact, other than the fact of a prior conviction, which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The Court has recently applied this constitutional mandate to invalidate the Federal Sentencing Guidelines, Washington state's sentencing scheme, and Arizona's Death Penalty Law to the extent they permitted judicial factfinding of aggravating factors to justify the imposition of a sentence greater than the maximum authorized by the

jury's verdict or the defendant's admissions. *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Blakely*, 542 U.S. 296, 124 S.Ct. 2531; *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

The procedure for imposing an upper term sentence under California's DSL contravenes the bright-line rule set forth in *Blakely* and *Apprendi* in violation of the Sixth Amendment right to a jury trial and the Fourteenth Amendment due process right to proof beyond a reasonable doubt. When a criminal defendant in California suffers a conviction for a felony offense which specifies three possible prison terms – a lower, middle, and upper term – the DSL requires the sentencing judge to impose the middle term unless the judge finds circumstances in aggravation or mitigation. Accordingly, the middle term is the presumptive sentence, or "statutory maximum" allowable for the offense. Nevertheless, without additional jury findings, the DSL authorizes the judge to depart from this presumptive term to impose an upper term based on the judge's finding of aggravating factors by a preponderance of the evidence. This procedure for imposing upper term sentences is indistinguishable from the Washington state procedure for imposing exceptional sentences which this Court found unconstitutional in *Blakely*.

In petitioner's case, his conviction under California Penal Code § 288.5 subjected him to a presumptive middle term of 12 years in state prison. However, the sentencing judge subsequently found six factors in aggravation and one factor in mitigation by a preponderance of the evidence. Determining that the aggravating factors outweighed the mitigating factor, the judge sentenced petitioner to the upper term of 16 years. *Blakely* and

Apprendi explicitly condemn as a Sixth Amendment violation such judicial factfinding of aggravating factors to justify the imposition of a sentence greater than the statutory maximum authorized by the jury's verdict. Similarly, this Court's precedents reveal the judge's imposition of four additional years in state prison based on his finding of aggravating factors by a mere *preponderance of the evidence* as a clear violation of petitioner's due process right to proof of every element of the charged crime beyond a reasonable doubt. California afforded petitioner adequate procedural safeguards, including a trial by jury and proof beyond a reasonable doubt, with regard to the charged section 288.5 offense. Yet, it failed to furnish him those very same safeguards as to the existence of aggravating factors despite the increased loss of liberty attending a finding of such factors. California has no principled basis for depriving defendants of basic protection in the proof of these aggravating factors, and does so simply by labelling the factors "circumstances in aggravation."

In *People v. Black,* the California Supreme Court concluded that the DSL's procedure for imposing the upper term does not offend the Sixth or Fourteenth Amendments. 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740. However, in arriving at this conclusion, the court relied on grounds decisively rejected in *Blakely*. Citing this Court's recent decision in *United States v. Booker*, the California Supreme Court maintained that the upper term constitutes the statutory maximum for purposes of Sixth Amendment analysis because California judges retain discretion not to impose the upper term even after finding factors in aggravation. The Court in *Blakely* exposed the fallacy of this distinction. Any judicial factfinding which

forms the basis for increasing a sentence beyond the maximum authorized by the jury's verdict – whether the judicially determined facts *require* a sentence enhancement or merely *allow* it – is unconstitutional. The California Supreme Court also deemed it critical that the list of aggravating factors a sentencing judge may consider under the DSL is illustrative rather than exhaustive. *Blakely* rejected this distinction too as immaterial. Whether a sentencing scheme permits a judge to impose an enhanced sentence based on an enumerated factor or an unenumerated factor does not change the fact that the jury's verdict alone still fails to authorize the enhanced sentence.

ARGUMENT

I. CALIFORNIA'S DETERMINATE SENTENCING LAW, BY PERMITTING SENTENCING JUDGES TO IMPOSE ENHANCED SENTENCES BASED ON THEIR DETERMINATION OF FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. *Blakely* And *Apprendi* Require Any Fact, Other Than The Fact Of A Prior Conviction, That Increases The Penalty For A Crime Beyond The Statutory Maximum To Be Submitted To A Jury And Proved Beyond A Reasonable Doubt.

The Sixth and Fourteenth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United*

States v. Gaudin, 515 U.S. 506, 509-510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *see also Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship*, 397 U.S. 358, 363-364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Sixth Amendment requires to be proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348; *Mullaney*, 421 U.S. at 698, 95 S.Ct. 1881; *Specht v. Patterson*, 386 U.S. 605, 607, 87 S.Ct. 1209, 18 L.Fd.2d 326 (1967).

The right to a jury trial reflects the historical intention to ensure the people's control in the judiciary. *Blakely*, 542 U.S. at 305-306, 124 S.Ct. 2531. "The very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Id.* at 308, 124 S.Ct. 2531. "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict." *Id.* at 306, 124 S.Ct. 2531. In particular, *Apprendi* requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348; *see also Booker*, 543 U.S. at 244, 125 S.Ct. 738. In *Apprendi*, a factual finding under New Jersey's hate crime statute that defendant committed the charged possession of a firearm offense with the purpose to intimidate individuals because of race increased the statutory maximum penalty from between five and ten years imprisonment to between ten and twenty years imprisonment. As a result, the Court determined

that this factual finding constituted an element of the offense to be submitted to a jury and proved beyond a reasonable doubt. *Apprendi,* 530 U.S. at 490-492, 120 S.Ct. 2348.

Ring v. Arizona applied the holding of *Apprendi* to Arizona's death penalty law. Under that law, the maximum punishment for first-degree murder was life imprisonment unless the trial judge found beyond a reasonable doubt that one of ten statutorily enumerated aggravating factors existed. This Court held that a death sentence under Arizona law violated the defendant's right to a jury determination of guilt on every element of the crime charged. *Ring,* 536 U.S. at 589, 122 S.Ct. 2428. Thus, the Sixth Amendment mandates that a jury, rather than a sentencing judge, find the existence of an aggravating factor necessary for the imposition of the death penalty. *Id.* at 609; 122 S.Ct. 2428.

Blakely v. Washington further elaborated on a defendant's right to a jury determination of non-recidivist aggravating factors beyond a reasonable doubt. There, defendant pleaded guilty to kidnaping his estranged wife while using a firearm. Under Washington law, the facts defendant admitted through his plea supported a prison sentence in the "standard range" of 49 to 53 months. However, Washington law also permitted the judge to impose a sentence *above* the standard range if he found the existence of an aggravating factor demonstrating "substantial and compelling reasons justifying an exceptional sentence." *Blakely,* 542 U.S. at 299, 124 S.Ct. 2531. The judge could make such a finding by a mere preponderance of the evidence. *State v. Gore,* 143 Wash.2d 288, 21 P.3d 262 (Wash. 2001); Wash. Rev. Code Ann. § 9.94A.370(2). Furthermore, he could choose from a non-exhaustive list of

aggravating factors, although he could not rely on a factor already used to compute the standard range sentence for the offense. *Blakely*, 542 U.S. at 299, 124 S.Ct. 2531. Pursuant to these sentencing provisions, the judge imposed an exceptional sentence of 90 months based on his finding that defendant had acted with "deliberate cruelty" in committing the kidnaping offense. *Id.* at 300, 124 S.Ct. 2531.

In invalidating Mr. Blakely's exceptional sentence, this Court initially observed:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* (Citations omitted.) In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts.

Id. at 303-304, 124 S.Ct. 2531 (emphasis in original). Applying this principle, the Court found that the statutory maximum sentence based solely on the facts defendant admitted in his guilty plea was the standard range of 49 to 53 months; the judge was prohibited from imposing the exceptional 90-month sentence on those facts alone. *Id.* at 304, 124 S.Ct. 2531. Consequently, the judge necessarily based his imposition of an additional 37 months beyond the statutory maximum upon a factual finding unsupported by defendant's plea and never found true by a jury beyond a reasonable doubt. *Ibid.* The imposition of the 90-month exceptional sentence under Washington's sentencing scheme therefore violated defendant's Sixth Amendment right to trial by jury. *Id.* at 305, 124 S.Ct. 2531.

Most recently, in *United States v. Booker*, this Court reaffirmed the bright-line rule of *Blakely* and *Apprendi* while invalidating the Federal Sentencing Guidelines to the extent that they permitted judges, based on their own factfinding, to impose sentences greater than those authorized by the jury's verdict. *See* 543 U.S. at 243-244, 125 S.Ct. 738. There, a jury convicted defendant of possessing at least 50 grams of crack cocaine with intent to distribute it, an offense which, when coupled with defendant's criminal history, mandated a prison sentence of between 210 and 262 months in prison under the Guidelines. However, during a sentencing hearing, the judge found by a preponderance of the evidence that defendant possessed an additional 566 grams of crack and had obstructed justice. Under the Guidelines, these additional findings compelled the judge to sentence defendant to a term of between 360 months and life imprisonment. The judge chose a sentence of 360 months. In concluding that this sentencing procedure violated defendant's Sixth Amendment right to a jury trial, this Court found "no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines in [this] case[]." *Id.* at 235, 125 S.Ct. 738. "The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just as in *Blakely*, 'the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.'" *Ibid.*[6]

---

[6] In a separate majority opinion, the Court in *Booker* addressed how to remedy the constitutional defects of the Guidelines in light of Congress' likely intent in enacting them. The Court achieved this result

(Continued on following page)

B. The Determinate Sentencing Law's Procedure For Imposing An Upper Term Violates Defendants' Sixth Amendment Right To A Jury Trial.

The procedure for imposing an upper term sentence under California's DSL infringes on defendants' Sixth Amendment right to a jury trial. Under the DSL, when a defendant is convicted of a felony offense which specifies three possible prison terms – a lower, middle, and upper term – the sentencing judge *must* impose the middle term unless the judge finds aggravating or mitigating factors. Cal. Pen. Code § 1170(b); Cal. Rules of Court, rule 4.420(a); *People v. Lobaugh*, 188 Cal.App.3d 780, 785, 233 Cal.Rptr. 683, 686 (Cal.App. 1987). Thus, the middle term is the presumptive sentence. *Black*, 35 Cal.4th at 1257, 113 P.3d at 545, 29 Cal.Rptr.3d at 753. Because the middle term is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury's verdict or admitted by the defendant, it also constitutes the "statutory maximum" for *Blakely* and *Apprendi* purposes. *Blakely*, 542 U.S. at 303-304, 124 S.Ct. 2531.

An upward deviation from the DSL's statutory maximum sentence operates exactly like an upward deviation under Washington's flawed sentencing law in *Blakely*. The DSL permits judges to impose an exceptional sentence only where they find aggravating circumstances justifying

---

by rendering the Guidelines advisory, thereby making the statutory maximum the maximum stated in the statute of conviction. 543 U.S. at 245-246, 125 S.Ct. 738. Under the new advisory system, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing," and the federal appellate courts must "review sentencing decisions for unreasonableness." *Id.* at 264, 125 S.Ct. 738.

the upper term; the imposition of an upper term in the absence of such aggravators requires reversal. § 1170(b); Cal. Rules of Court, rule 4.420(a) & (b); *Black*, 35 Cal.4th at 1247, 113 P.3d at 538, 29 Cal.Rptr.3d at 744; *People v. Simon*, 208 Cal.App.3d 841, 852, 256 Cal.Rptr. 373, 380 (Cal.App. 1989). The DSL allows judges to find aggravating circumstances by a mere preponderance of the evidence. Cal. Rules of Court, rule 4.420(b); *People v. Wright*, 30 Cal.3d 705, 710, 639 P.2d 267, 269, 180 Cal.Rptr. 196, 199 (Cal. 1982). It provides judges with an illustrative list of aggravating factors from which to choose. Cal. Rules of Court, rules 4.408(a) & 4.421. Finally, it prohibits judges from imposing the upper term based on aggravating factors which are elements of the crime or facts found true and used to enhance the sentence. § 1170(b); Cal. Rules of Court, rule 4.420(c) & (d); *People v. Garcia*, 32 Cal.App.4th 1756, 1777, n.15, 39 Cal.Rptr.2d 73, 85, n.15 (Cal.App. 1995); *People v. Fernandez*, 226 Cal.App.3d 669, 680, 276 Cal.Rptr. 631, 637 (Cal.App. 1990); *People v. Young*, 146 Cal.App.3d 729, 734, 194 Cal.Rptr. 338, 341 (Cal.App. 1983).[7] As in *Blakely*, then, the DSL violates defendants' jury trial right by allowing judges to impose a sentence beyond the statutory maximum based on factual findings unsupported by the jury's verdict and never found true by a jury. *Blakely*, 542 U.S. at 304-305, 124 S.Ct. 2531.

---

[7] Also similar to Washington's sentencing procedure, the DSL requires judges to state orally on the record their reasons for selecting the upper term, including "a concise statement of the ultimate facts which the court deemed to constitute aggravation. . . ." Cal. Rules of Court, rule 4.420(e); *see also* § 1170(b); *Black*, 35 Cal.4th at 1248, 113 P.3d at 539, 29 Cal.Rptr.3d at 745; *cf. Blakely*, 542 U.S. at 299, 124 S.Ct. 2531 ["When a judge imposes an exceptional sentence [under Washington law], he must set forth findings of fact and conclusions of law supporting it."].

California Penal Code § 288.5 – the provision under which petitioner was convicted – provides that anyone who violates that section "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." Cal. Pen. Code § 288.5(a). In the absence of aggravating factors, a deviation from the middle term sentence of 12 years to the upper term of 16 years is unauthorized under the DSL. § 1170(b); Cal. Rules of Court, rule 4.420(a) & (b). Thus, pursuant to *Apprendi* and *Blakely*, the middle term of 12 years is the "statutory maximum" sentence that a judge may impose for a section 288.5 conviction "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303, 124 S.Ct. 2531 (emphasis in original).

Without the benefit of additional jury factfinding, the judge in this case found six aggravating factors based upon which he departed from the statutory maximum of 12 years and sentenced petitioner to the upper term of 16 years. In doing so, the judge necessarily found the existence of facts beyond those inherent in the jury's verdict. *See* Cal. Rules of Court, rule 4.420(d) [prohibiting judges from imposing upper term based on aggravating factors which are elements of crime]. Indeed, the judge here could no more impose an upper term of 16 years for petitioner's conviction without finding one or more factors in aggravation than the judge in *Blakely* could impose the additional 37-month sentence without finding that defendant acted with "deliberate cruelty," or than the judge in *Ring* could sentence defendant to the death penalty without finding one of ten aggravating factors, or than the judge in *Apprendi* could impose an additional ten-year sentence without finding that defendant acted with the purpose to intimidate individuals because of their race. Yet, as

Blakely, *Ring*, and *Apprendi* make crystal clear, such judicial factfinding of aggravating factors to justify the imposition of a sentence greater than the statutory maximum authorized by the jury's verdict runs afoul of the Sixth Amendment right to a jury trial. *Blakely*, 542 U.S. at 305, 124 S.Ct. 2531; *Ring*, 536 U.S. at 589, 122 S.Ct. 2428; *Apprendi*, 530 U.S. at 490-492, 120 S.Ct. 2348.

As this Court also explained in *Apprendi*, justice is not served when a state metes out punishment without providing adequate procedural safeguards, including the right to a jury trial:

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentencing enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

530 U.S. at 476, 120 S.Ct. 2348.

California threatened petitioner with certain pains if he committed the crime of continuous sexual assault on a child and certain additional pains if he committed other aggravating acts, such as threatening bodily injury to coerce the victim to recant. Cal. Rules of Court, rule 4.421(a)(6). Whereas California fulfilled its obligation to afford petitioner procedural safeguards to protect him against unwarranted pains attending a finding that he committed the charged offense, it failed in its duty to furnish him the very same safeguards relating to whether

he committed aggravating acts which subjected him to four additional years of punishment in state prison. California achieves this inconsistent treatment by merely describing these latter acts as "circumstances in aggravation" and enlisting its sentencing judges to determine their existence. Cal. Rules of Court, rule 4.421. Such labelling "surely does not provide a principled basis for treating them differently." *Apprendi*, 530 U.S. at 476, 120 S.Ct. 2348.[8]

In sum, as the Court concluded in *Blakely*:

> The Framers would not have thought it too much to demand that, before depriving a man of [four] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," (citation omitted), rather than a lone employee of the State.

542 U.S. at 313-314, 124 S.Ct. 2531. The judge's imposition of a 16-year upper term in this case violated petitioner's Sixth Amendment right to a jury determination of every fact which increases the defendant's penalty beyond the statutory maximum.

---

[8] Similarly, California's sentencing procedure frustrates "[t]he defendant's ability to predict with certainty the judgment from the face of the felony indictment." *Apprendi*, 530 U.S. at 478, 120 S.Ct. 2348. The prosecution here alleged facts in the indictment which subjected petitioner to a state prison term of only 12 years. J.A. 2-3. Nevertheless, the trial judge ultimately sentenced petitioner to a term of 16 years based on facts never alleged in the indictment or proved to a jury.

C. The Determinate Sentencing Law's Procedure For Imposing An Upper Term Violates Defendants' Due Process Right To Proof Beyond A Reasonable Doubt.

The DSL's procedure for imposing an upper term also violates defendants' right under the Due Process Clause to proof of every element of the charged crime *beyond a reasonable doubt. United States v. Gaudin,* 515 U.S. 506, 509-510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *Mullaney v. Wilbur,* 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." (Citation omitted.) . . . "[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." (Citation omitted).

In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *see also Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) ["the interests of the [criminal] defendant are of such magnitude that historically . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."]. Where proof of a particular fact exposes the defendant to greater punishment than that

available in the absence of such proof, that fact is an element of the crime which must be proven beyond a reasonable doubt. *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348.

California's DSL directs judges to determine the existence of aggravating factors for purposes of imposing punishment above and beyond the presumptive term authorized by the jury's verdict. Although the jury renders its verdict on the charged offenses beyond a reasonable doubt, the DSL allows judges to find aggravating circumstances by a mere preponderance of the evidence. Cal. Rules of Court, rule 4.420(b); *People v. Wright*, 30 Cal.3d 705, 710, 639 P.2d 267, 269, 180 Cal.Rptr. 196, 199 (Cal. 1982). Thus, the accused "routinely see[s] his maximum potential sentence balloon . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." *Blakely*, 542 U.S. at 311-312, 124 S.Ct. 2531. Indeed, in sentencing petitioner in this case, the judge imposed four additional years above the statutory maximum after finding factors in aggravation by only a preponderance of the evidence. This violated petitioner's due process right to proof beyond a reasonable doubt. *Accord* J.A. 48-50 [concurring and dissenting opinion of Presiding Justice Jones, who would have remanded petitioner's case for jury findings *beyond a reasonable doubt* on factors in aggravation].

D. The California Supreme Court Has Misinterpreted This Court's Precedents In Finding The DSL Constitutional.

Despite the similarities between Washington state's sentencing scheme in *Blakely* and California's DSL, the California Supreme Court has now concluded that the procedure for imposing an upper term under the DSL does not run afoul of the "bright-line rule" set forth in *Blakely* and *Apprendi*. *Blakely*, 542 U.S. at 308, 124 S.Ct. 2531; *Black*, 35 Cal.4th at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750; *see also* J.A. 46-48. The court in *Black* based this conclusion on the discretion sentencing judges have under the DSL to impose the lower, middle, or upper term after the jury has returned a guilty verdict. *Black*, 35 Cal.4th at 1257-1258, 113 P.3d at 545-546, 29 Cal.Rptr.3d at 752-753. However, this Court has repeatedly rejected the precise arguments the California Supreme Court set forth in *Black* in defense of the DSL's constitutionality.

In *Black*, the California Supreme Court conceded that the mandatory language of California Penal Code § 1170(b) – compelling judges to impose the middle term unless there are circumstances in aggravation or mitigation – "can be characterized as establishing the middle term sentence as a presumptive sentence. . . ." 35 Cal.4th at 1257, 113 P.3d at 545, 29 Cal.Rptr.3d at 753. Nevertheless, the court decided that the upper term constitutes the "statutory maximum" for purposes of Sixth Amendment analysis because California judges retain discretion over whether to impose the upper term even after finding factors in aggravation. *Id.* at 1254, 113 P.3d at 543, 29 Cal.Rptr.3d at 750. The court reasoned:

> The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of

> the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. The judicial factfinding that occurs during that selection process is the same type of judicial factfinding that traditionally has been a part of the sentencing process. Therefore, the upper term is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict.*"

Id. at 1257-1258, 113 P.3d at 545, 29 Cal.Rptr.3d at 753, quoting *Blakely*, 542 U.S. at 303, 124 S.Ct. 2531 (emphasis in original); *see also Black*, 35 Cal.4th at 1255, 113 P.3d at 544, 29 Cal.Rptr.3d at 751 ["the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be *reasonable.*"] (emphasis in original).

Similarly, the California Supreme Court drew support for its position from *United States v. Booker*, likening the DSL to the revised federal system approved in *Booker* which treats the Guidelines as advisory:

> The level of discretion available to a California judge in selecting which of the three available terms to impose appears comparable to the level of discretion that the high court has chosen to permit federal judges in post-*Booker* sentencing. Because an aggravating factor under California law may include any factor that the judge reasonably deems to be relevant, the determinate sentencing law's requirement that an upper term sentence be imposed only if an aggravating factor exists is comparable to *Booker's* requirement that

> a federal judge's sentencing decision not be unreasonable.

Id. at 1261, 113 P.3d at 548, 29 Cal.Rptr.3d at 756.

The California Supreme Court in *Black* has failed to adhere to this Court's oft-repeated bright-line rule that *any* judicial factfinding which increases a sentence beyond the maximum authorized by the jury's verdict or the defendant's admissions violates the Sixth Amendment. *See, e.g., Booker,* 543 U.S. at 232, 125 S.Ct. 738; *Blakely*, 542 U.S. at 303, 308, 124 S.Ct. 2531 [referencing "*Apprendi's* bright-line rule"]; *Ring*, 536 U.S. at 602, 122 S.Ct. 2428; *Apprendi,* 530 U.S. at 483, 120 S.Ct. 2348.[9] This rule does not change simply because a sentencing scheme gives its judges discretion whether to impose an upper term upon the finding of one or more aggravators. Rather, the crucial inquiry is whether the scheme permits judges to impose an additional sentence based on circumstances that cause an "increase in the defendant's authorized punishment." *Ring*, 536 U.S. at 602, 122 S.Ct. 2428.

Indeed, in *Blakely* – which presented a sentencing scheme with judicial discretion all but indistinguishable from that provided under the DSL – this Court soundly rejected as fallacious the distinction the California Supreme Court has made in *Black*: "Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." *Blakely,* 542 U.S. at 305, n.8, 124 S.Ct. 2531 (emphasis in original); *cf. Black,* 35 Cal.4th at 1271, 113

---

[9] The court in *Black* actually insisted that this "[C]ourt's precedents do *not* draw a bright line. . . ." *Black*, 35 Cal.4th at 1260, 113 P.3d at 547, 29 Cal.Rptr.3d at 755 (emphasis supplied).

P.3d at 555, 29 Cal.Rptr.3d at 764 (conc. & dis. opn. of Kennard, J.) [finding no difference between judicial discretion afforded California sentencing judges under DSL and discretion afforded judges under Washington scheme in *Blakely*].[10] Furthermore, contrary to the California Supreme Court's understanding, what made the federal system constitutionally acceptable after this Court rendered the Guidelines advisory in *Booker* was *not* the additional discretion afforded judges, but the fact that the federal system effectively became an indeterminate sentencing scheme in which the top of the range of the applicable statute constitutes the statutory maximum, *see Booker*, 543 U.S. at 245-246, 125 S.Ct. 738; California can enact a similar fix if it so chooses.

Also critical to the California Supreme Court's holding in *Black* was that the DSL does not restrict the aggravating

---

[10] In her dissent from the majority's refusal to find a constitutional violation in the DSL's implementation, Justice Kennard correctly observed: "Hard as it tries, the majority here cannot point to any significant differences between California's sentencing law and the Washington sentencing scheme that the high court invalidated in *Blakely*. . . ." *Black*, 35 Cal.4th at 1271, 113 P.3d at 554, 29 Cal.Rptr.3d at 764 (conc. & dis. opn. of Kennard, J.). Justice Kennard concluded that under this Court's precedents, a California sentencing judge

> may use an aggravating fact to justify an upper term only if: (1) a jury has made a finding on the aggravating fact, (2) the defendant has admitted the aggravating fact, (3) the defendant has validly waived the right to a jury trial on the aggravating fact, or (4) the aggravating fact relates to the defendant's criminal record rather than to the circumstances of the conviction offense. Absent one of these situations, the trial court may not impose an upper term sentence.

Id. at 1265, 113 P.3d at 550, 29 Cal.Rptr.3d at 759 (conc. & dis. opn. of Kennard, J.).

factors a sentencing judge may consider in imposing the upper term:

> More significantly, the availability of upper term sentences under the determinate sentencing law does not represent a legislative effort to shift the proof of particular facts from elements of a crime (to be proved to a jury) to sentencing factors (to be decided by a judge). The Legislature did not identify all of the particular facts that could justify the upper term. Instead, it afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence. Such a system does not diminish the traditional power of the jury.

35 Cal.4th at 1256, 113 P.3d at 544, 29 Cal.Rptr.3d at 752. Again, however, the *Blakely* majority repudiated this very rationale when the State of Washington raised it in that case:

> [T]he State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

Blakely, 542 U.S. at 305, 124 S.Ct. 2531 (emphasis in original).

Thus, merely because California's list of aggravating factors is illustrative does not somehow exempt the DSL

from the rule that, other than the fact of a prior conviction, *any fact* – whether enumerated or unenumerated – that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. A sentencing judge will violate this constitutionally-based rule when it imposes a sentence beyond the statutory maximum authorized by the jury's verdict by finding one or more factors in aggravation, whether specifically listed in California Rules of Court, rule 4.421 or not.[11]

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the California Court of Appeal and hold that California's Determinate Sentencing Law is unconstitutional to the extent that it permits sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant.

DATED: May 8, 2006.

Respectfully submitted,

PETER GOLD
Counsel of Record
2269 Chestnut St., #124
San Francisco, CA 94123
(510) 872-6305

Attorney for Petitioner

[11] *Blakely* also found no support for the idea – advanced by the dissenters in *Blakely* and embraced by the California Supreme Court in *Black* – that judicial factfinding of the kind which occurs under the DSL "traditionally has been a part of the sentencing process," *Black*, 35 Cal.4th at 1258, 113 P.3d at 545, 29 Cal.Rptr.3d at 753. *Blakely*, 542 U.S. at 301-302 and n.6, 124 S.Ct. 2531.

2

No. 05-6551

FILED
JUL 12 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JOHN CUNNINGHAM,

Petitioner,

v.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Solicitor General
STAN HELFMAN
Supervising Deputy Attorney General
JEFFREY M. LAURENCE
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5897
Fax: (415) 703-1234
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Blakely v. *Washington*, 542 U.S. 296 (2004), precludes an enhanced sentence above that authorized by the jury verdict alone, based on a fact (other than a prior conviction) neither found at trial nor admitted by the defendant. *United States* v. *Booker*, 543 U.S. 220 (2005), allows a sentence within the authorized range based on judicial factfinding, notwithstanding a reasonableness requirement that constrains the sentencing court's exercise of discretion within that authorized range.

The question presented is whether California's authorization of an upper term based on the jury verdict alone, subject to the requirement that the upper term be reasonable, is *Blakely*-compliant in light of *Booker*.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
PETITIONER'S UPPER TERM SENTENCE DOES NOT EXCEED THE STATUTORY MAXIMUM FOR SIXTH AND FOURTEENTH AMENDMENT PURPOSES BECAUSE UNDER CALIFORNIA'S DETERMINATE SENTENCING SYSTEM THE ENTIRE CRIME-SPECIFIC BASE RANGE IS LEGALLY AUTHORIZED BY THE JURY VERDICT ALONE SUBJECT ONLY TO A REASONABLENESS REQUIREMENT	5
A. California's Determinate Sentencing Scheme Restricts Judicial Factfinding To Discretionary Sentencing Choices Within The Offense-Specific Statutory Base Range	7
B. *Apprendi*, *Blakely*, And *Booker* Provide That The Statutory Maximum For Constitutional Purposes Is The Top Of The Offense-Specific Base Range That The Trial Court Is Legally Authorized To Impose, And Sentencing Based On Judicial Factfinding Is Permissible Within That Base Range	13
C. Under California's Determinate Sentencing Law, The Upper Term Sentence Is The Statutory Maximum For *Blakely* Purposes Because Trial Courts Are Legally Authorized To Impose That Term Based On The Jury Verdict Alone	19

TABLE OF CONTENTS—Continued

Page

D. California Penal Code Section 1170(b), Which Functions As A Reasonableness Constraint On The Trial Court's Decision To Impose The Upper Term, Does Not Render The Upper Term Legally Unavailable Based On The Verdict Alone 28

E. *Booker* Establishes That A Reasonableness Constraint On The Trial Court's Ultimate Discretion To Select Punishments Within A Range Does Not Alter The Legal Availability Of The Terms Within The Range 35

1. California's determinate sentence system complies with *Booker*'s constitutional structure 36

2. *Booker*'s reasonableness review requirement effectively mandates a federal court not impose the statutory maximum sentence in the absence of any justification beyond the fact of the crime 38

3. Section 1170(b)'s reasonableness constraint is constitutionally equivalent to the reasonableness review requirement validated in *Booker* 43

4. Petitioner's upper term sentence is constitutional 45

CONCLUSION 47

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

Cases

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 20

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) ..... *passim*

Blakely v. *Washington*, 542 U.S. 296 (2004) ..... *passim*

Garner v. *Louisiana*, 368 U.S. 157 (1961) 33

In re Harris, 49 Cal. 3d 131, 775 P.2d 1057, 260 Cal. Rptr. 288 (1989) 23

Jones v. *United States*, 526 U.S. 227 (1999) 17

Martin v. *Franklin Capital Corp.*, ___ U.S. ___, 126 S. Ct. 704 (2005) 39

McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 44

Milwaukee v. *Cement Div., National Gypsum Co.*, 515 U.S. 189 (1995) 39

Monge v. *California*, 524 U.S. 721 (1998) 19

People v. *Black*, 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740 (2005) ..... *passim*

People v. *Brown*, 83 Cal. App. 4th 1037, 100 Cal. Rptr. 2d 211 (2000) 10, 11

People v. *Burbine*, 106 Cal. App. 4th 1250, 131 Cal. Rptr. 2d 628 (2003) 30

People v. *Cattaneo*, 217 Cal. App. 3d 1577, 266 Cal. Rptr. 710 (1990) 10, 33

People v. *Dent*, 38 Cal. App. 4th 1726, 45 Cal. Rptr. 2d 746 (1995) 11

TABLE OF AUTHORITIES—Continued

Page

People v. *Evans*, 141 Cal. App. 3d 1019, 190 Cal. Rptr. 633 (1983) 10, 12

People v. *Guevara*, 88 Cal. App. 3d 86, 151 Cal. Rptr. 511 (1979) 10, 32

People v. *Hernandez*, 46 Cal. 3d 194, 757 P.2d 1013, 249 Cal. Rptr. 850 (1988) 20, 21, 24

People v. *King*, 5 Cal. 4th 59, 851 P.2d 27, 19 Cal. Rptr. 2d 233 (1993) 20

People v. *Knowlden*, 171 Cal. App. 3d 1052, 217 Cal. Rptr. 758 (1985) 33

People v. *Mancebo*, 27 Cal. 4th 735, 41 P.3d 556, 117 Cal. Rptr. 2d 550 (2002) 9

People v. *Miller*, 6 Cal. App. 4th 873, 8 Cal. Rptr. 2d 193 (1992) 23

People v. *Oberreuter*, 204 Cal. App. 3d 884, 251 Cal. Rptr. 522 (1988) 11

People v. *Olken*, 125 Cal. App. 3d 1064, 178 Cal. Rptr. 497 (1981) 23

People v. *Roe*, 148 Cal. App. 3d 112, 195 Cal. Rptr. 802 (1983) 11

People v. *Savala*, 147 Cal. App. 3d 63, 195 Cal. Rptr. 193 (1983) 31

People v. *Scott*, 9 Cal. 4th 331, 885 P.2d 1040, 36 Cal. Rptr. 2d 627 (1994) 22, 23, 24

People v. *Stevens*, 205 Cal. App. 3d 1452, 253 Cal. Rptr. 173 (1988) 30

People v. *Walker*, 54 Cal. 3d 1013, 819 P.2d 861, 1 Cal. Rptr. 2d 902 (1991) 11

TABLE OF AUTHORITIES—Continued

Page

People v. *Williams*, 17 Cal. 4th 148, 948 P.2d 429, 69 Cal. Rptr. 2d 917 (1998) 11

People v. *Williams*, 30 Cal. 3d 470, 637 P.2d 1029, 179 Cal. Rptr. 443 (1981) 31

Ring v. *Arizona*, 536 U.S. 584 (2002) 17, 18, 33

United States v. *Alonzo*, 435 F.3d 551 (5th Cir. 2006) 39

United States v. *Booker*, 543 U.S. 220 (2005) ..... *passim*

United States v. *Bryant*, 446 F.3d 1317 (8th Cir. 2006) 41

United States v. *Cage*, ___ F.3d ___, 2006 WL 1554674 (10th Cir. 2006) 37, 41, 43

United States v. *Cooper*, 437 F.3d 324 (3d Cir. 2006) 40

United States v. *Dean*, 414 F.3d 725 (7th Cir. 2005) ... 41, 45

United States v. *Fernandez*, 443 F.3d 19 (2d Cir. 2006) 12, 40

United States v. *Grier*, 449 F.3d 558 (3d Cir. 2006) 43, 44

United States v. *Haack*, 403 F.3d 997 (8th Cir. 2005) 42

United States v. *Hampton*, 441 F.3d 284 (4th Cir. 2006) 41

United States v. *Jiménez-Beltre*, 440 F.3d 514 (1st Cir. 2006) (en banc) 40

United States v. *Johnson*, 445 F.3d 339 (4th Cir. 2006) 39

United States v. *Kristl*, 437 F.3d 1050 (10th Cir. 2006) 39

TABLE OF AUTHORITIES—Continued

Page

United States v. *Lazenby*, 439 F.3d 928 (8th Cir. 2006) 12

United States v. *Lincoln*, 413 F.3d 716 (8th Cir. 2005) 39

United States v. *Mix*, 450 F.3d 375 (9th Cir. 2006) 40, 41

United States v. *Mykytiuk*, 415 F.3d 606 (7th Cir. 2005) 39

United States v. *Reinhart*, 442 F.3d 857 (5th Cir. 2006) 12

United States v. *Simpson*, 430 F.3d 1177 (D.C. Cir. 2005) 41

United States v. *Smith*, 440 F.3d 704 (5th Cir. 2006) 41

United States v. *Smith*, 445 F.3d 1 (1st Cir. 2006) 41

United States v. *Staten*, 450 F.3d 384 (9th Cir. 2006) 43

United States v. *Talley*, 431 F.3d 784 (11th Cir. 2005) 39, 42

United States v. *Watts*, 519 U.S. 148 (1997) (per curiam) 44

United States v. *Williams*, 436 F.3d 706 (6th Cir. 2006) 39

United States v. *Zavala*, 443 F.3d 1165 (9th Cir. 2006) 40

Wainwright v. *Goode*, 464 U.S. 78 (1983) 33

Washington v. *Recuenco*, ___ U.S. ___, 2006 WL 1725561 (2006) 16

Williams v. *New York*, 337 U.S. 241 (1949) 16, 28

TABLE OF AUTHORITIES—Continued

Page

Constitutional Provisions

United States Constitution
Sixth Amendment ..... *passim*
Fourteenth Amendment 7, 45

California Constitution
art. VI, § 6 31

Statutes

18 U.S.C. § 3553(a) 36, 38, 42, 43

California Health and Safety Code
§ 11370.4 8

California Penal Code
§ 17 27
§ 18 ..... 7, 27
§ 187 7
§ 190 7
§ 213 7
§ 245 9
§ 245(a)(1) 9
§ 245(a)(3) 9
§ 245(b) 9
§ 245(c) 9
§ 288.5 ..... 1, 27, 46
§ 667.61 8
§ 667.61(i) 8
§ 667.9 8
§ 667.10 8
§ 1169 27
§ 1170(a) 32
§ 1170(a)(1) 7
§ 1170(b) ..... *passim*
§ 1170.1(e) 8

TABLE OF AUTHORITIES—Continued

Page

§ 1202.4 27
§ 1203 27
§ 12022 8
§ 12022.1 8
§§ 12022.5-12022.55 8
§ 12022.6 8
§ 12022.7 8
§ 12022.75 8
§ 12022.8 8
§ 12022.9 8

Court Rules

California Rules of Court
4.408 1
4.408(a) 10, 32
4.409 1
4.410 1
4.420 1
4.420(b) 11, 31, 43, 44
4.420(c) 10
4.420(d) 10
4.420(e) 10
4.421 ..... 1, 10
4.423 10
29.4(b)(1) 3

Other Authorities

Judicial Council of California Criminal Jury Instructions (2006)
No. 860 9
No. 875 9

STATEMENT OF THE CASE

1. During 2000, ten-year-old John Doe repeatedly was subjected to forcible sodomy and oral copulation by petitioner, Doe's father and a longtime police officer. J.A. 27-28; Reporter's Transcript (R.T.) 486-87. In December, despite petitioner's threat to kill Doe if he revealed the abuse, Doe told a cousin and an aunt. J.A. 28-29; R.T. 66, 70. Petitioner confronted Doe, saying, "In a week you better say you are lying or else I am going to f— you up." J.A. 29. Nevertheless, Doe detailed petitioner's abuse to police and testified to it at trial. J.A. 28-29.

When interviewed by authorities, petitioner denied sexual contact with Doe, but later in the interview said his penis once was in Doe's mouth for five seconds in the shower. J.A. 29-30; R.T. 248. Petitioner indicated Doe was homosexual and had to be stopped from orally copulating petitioner. J.A. 30; R.T. 250; People's Trial Exhibit 7 (Ex. 7) at 25-33. Petitioner also asserted that one time he had to fend off Doe who tried to hold petitioner's penis as petitioner dressed. R.T. 248; Ex. 7 at 33-35. At trial, petitioner denied sexual acts on children and maintained that Doe was the aggressor in the shower incident. J.A. 30; R.T. 553-59, 574-78.

2. The jury convicted petitioner of continuous sexual abuse of a child under the age of 14, J.A. 27, a crime punishable with imprisonment for six, twelve, or sixteen years under California Penal Code section 288.5.[1] At sentencing, the trial court considered a probation officer's report, psychological evaluations of petitioner, letters and

---

[1] The relevant provisions of California Penal Code sections 288.5 and 1170(b), and of California Rules of Court 4.408, 4.409, 4.410, 4.420, 4.421, and 4.423 are set forth in the appendix to this brief.

statements of various persons, and memoranda and arguments of the parties. J.A. 6-20, 42. After denying probation, J.A. 20-21, the court identified six aggravating factors: (1) the crime involved great violence and a threat of great bodily harm, disclosing a high degree of viciousness and callousness; (2) the victim was particularly vulnerable; (3) petitioner threatened to inflict bodily injury upon the victim in attempting to coerce the victim to recant; (4) petitioner took advantage of a position of trust; (5) petitioner's violent conduct indicated a serious danger to the community; and (6) petitioner as a peace officer violated his duty to serve the community which included the victim, J.A. 22-23, 42. It found mitigation in petitioner's lack of prior criminal conduct. J.A. 22, 42. Concluding that aggravation outweighed mitigation, and further finding that sentencing objectives of societal protection, punishment, deterrence, and isolation applied, the court imposed the sixteen-year upper term. J.A. 23.

3. On appeal, the California Court of Appeal decided that Doe's vulnerability and petitioner's abuse of trust constituted one aggravating factor under state law. J.A. 43-44. The court did not resolve petitioner's other challenges to the aggravating factors identified by the trial court, concluding that petitioner's abuse of a position of trust, coupled with his threats and violent conduct indicating the serious danger he posed to society, were more than sufficient to justify the upper term even assuming no other aggravating factors applied. J.A. 44-46. It held that remand for reconsideration of the sentencing decision was unnecessary because there was no reasonable probability a lesser sentence would be imposed in light of those two factors. J.A. 51. The court rejected petitioner's claim that the sentence violated *Blakely* v. *Washington*, 542 U.S. 296 (2004), holding that the upper term was within the authorized range of

punishment based on the jury verdict alone. J.A. 47. A dissenting justice found *Blakely* violated because the judge, not the jury, found the aggravating circumstances. J.A. 48-50.

4. On June 20, 2005, the California Supreme Court decided *People* v. *Black*, 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740 (2005), holding that California's determinate sentencing system complied with *Blakely* and *Booker*. Nine days later, the California Supreme Court denied review in this case "without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black*[, 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740 (2005)] regarding the effect of *Blakely v. Washington*[, 542 U.S. 296 (2004)], and *United States v. Booker*[, 543 U.S. 220 (2005)], on California law." Petitioner was entitled to no relief when *Black* became final on July 20, 2005, see Cal. R. Ct. 29.4(b)(1), as there was no change in *Black*'s holding that upper term sentences, such as petitioner's, did not violate the constitutional rule of *Blakely* and *Booker*.

SUMMARY OF ARGUMENT

California's sentencing law avoids the constitutional problems identified in *Apprendi* v. *New Jersey*, *Blakely* v. *Washington*, and *United States* v. *Booker*. Under those precedents, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." California's sentencing system comports with this Court's jurisprudence because it restricts judicial factfinding to

discretionary sentencing choices within the base range authorized by the finding of guilt. Indeed, it provides for review of those choices for reasonableness in a manner this Court has endorsed as ensuring the constitutionality of the Federal Sentencing Guidelines.

California's sentencing system sets out each felony offense's specific base sentencing range as comprising a lower, middle, and upper term. As the California Supreme Court authoritatively explained in *People* v. *Black*, the trial court legally is authorized to impose any of the three terms in the base range based on a verdict of guilt alone. In California's system, then, the upper term of the base range is the statutory maximum for the underlying crime. Judicial factfinding is restricted to the function of merely selecting an appropriate term within the offense-specific base range. For a judge to exceed the base range—for example, by employing an "enhancement" or an alternative sentencing scheme—the predicate fact for the enhancement or alternative scheme must be pleaded and proved to a jury beyond a reasonable doubt. The historical roles of the judge and the jury are preserved.

The constitutionality of the California system is confirmed rather than undermined by the fact that the trial court's discretion in selecting among the three base-range terms is subject to the constraint, set out in California Penal Code section 1170(b), that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Section 1170(b) is not a threshold requirement that renders an upper term sentence unauthorized in the absence of judicial factfinding beyond the verdict alone. Instead, section 1170(b) is a reasonableness constraint on the court's selection of a term within the base range after the court has considered all of the relevant circumstances

relating to the offense and offender. The court's selection of a sentence within the base range is reviewed for abuse of discretion. In this way, section 1170(b) operates like the reforms this Court adopted in *Booker*.

As recognized in *Booker*, a threshold factfinding requirement that must be satisfied before a court legally can impose a particular sentence is fundamentally different from a reasonableness requirement that only constrains the court's selection of a particular available sentence after balancing relevant considerations. The former implicates the statutory maximum as a substantive limitation on the court's authority to reach a particular sentence. The latter does not implicate the statutory maximum, even if tied to the presence or absence of aggravating factors in a particular case. Imposing a reasonableness constraint on the court's selection of a term based on the circumstances of the case does not reduce the maximum term legally available based on the verdict alone. Consequently, section 1170(b) does not alter the legal availability of the upper term for constitutional purposes in determining the statutory maximum.

ARGUMENT

PETITIONER'S UPPER TERM SENTENCE DOES NOT EXCEED THE STATUTORY MAXIMUM FOR SIXTH AND FOURTEENTH AMENDMENT PURPOSES BECAUSE UNDER CALIFORNIA'S DETERMINATE SENTENCING SYSTEM THE ENTIRE CRIME-SPECIFIC BASE RANGE IS LEGALLY AUTHORIZED BY THE JURY VERDICT ALONE SUBJECT ONLY TO A REASONABLENESS REQUIREMENT

Petitioner asserts that California's determinate sentencing law identifies the midterm as the presumptive sentence yet allows the trial court to impose an upper

term based on aggravating circumstances not found true by a jury. This, he claims, violates the Sixth and Fourteenth Amendments as construed in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004). Petitioner's argument ignores the California Supreme Court's authoritative construction of the determinate sentencing law as explained in *People* v. *Black*, 35 Cal. 4th 1238, 113 P.3d 534, 29 Cal. Rptr. 3d 740 (2005). He also overlooks the constitutional equivalency of California's sentencing system and the reformed Federal Guidelines system validated in *United States* v. *Booker*, 543 U.S. 220 (2005).

California preserves the constitutional role of the jury in conducting factfinding for sentencing above the statutory maximum, while permitting the judge to conduct factfinding within an offense-specific base range consisting of a lower, middle, and upper term. State law defines a fixed base range for each offense and separately defines enhancements or departures forming alternative sentence schemes based on enhancing conduct. California requires that any fact necessary to enhance or depart from the offense-specific base range be proved to a jury beyond a reasonable doubt. But the verdict authorizes any term within the base range so long as the court's choice is reasonable in light of all relevant circumstances.

California Penal Code section 1170(b) recognizes that the upper term is unreasonable and an abuse of discretion absent aggravation of the crime. Its reasonableness requirement does not render judicial factfinding in selecting the upper term unconstitutional. *Booker* reflects that a reasonableness constraint, such as section 1170(b), does not make an aggravated term legally unavailable in the absence of additional factfinding beyond the elements found by the jury. Consequently, petitioner's upper term

sentence does not violate the Sixth and Fourteenth Amendments.

A. California's Determinate Sentencing Scheme Restricts Judicial Factfinding To Discretionary Sentencing Choices Within The Offense-Specific Statutory Base Range

1. In 1977, California adopted a determinate sentencing system after concluding that its indeterminate scheme was unpredictable and lacked assurances of uniformity in sentencing. *Black*, 35 Cal. 4th at 1246, 113 P.3d at 537, 29 Cal. Rptr. 3d at 743. The State enacted a system of base ranges and departure statutes to achieve felony sentences "'in proportion to the seriousness of the offenses as determined by the Legislature to be imposed by the court *with specified discretion.*'" *Id.* (quoting Cal. Penal Code § 1170(a)(1)).

California's system makes nearly every noncapital felony offense punishable by a base-range triad of fixed terms specified by one of two methods.[2] For numerous felonies, the legislature has identified the specific triad deemed commensurate with the seriousness of the offense. See, *e.g.*, Cal. Penal Code § 213 (establishing base ranges of "two, three, or five years" for second degree robbery, and "three, four, or six years" for first degree robbery). If no triad is specified, a catch-all provision in California Penal Code section 18 applies, under which the offense "is punishable by imprisonment in any of the state prisons for 16 months, or two or three years."

---

[2] The most serious offenses in California carry indeterminate life terms with minimum parole eligibility dates. See, *e.g.*, Cal. Penal Code §§ 187, 190 (murder).

Statutory "enhancements" add terms onto the base-range term selected by the court. Enhancements are predicated on the existence of specific facts relating to the offender (such as the defendant's criminal history), or the offense (such as the use of a firearm or other dangerous weapon, infliction of great bodily injury on the victim, the particular vulnerability of the victim, commission of the crime while released pending trial, the amount of property loss, or the quantity of drugs involved). See *Black*, 35 Cal. 4th at 1246 n.3, 113 P.3d at 537 n.3, 29 Cal. Rptr. 3d at 744 n.3.[3] Enhancements must be pleaded and proved to a jury beyond a reasonable doubt. *Id.* at 1247, 113 P.3d at 538, 29 Cal. Rptr. 3d at 744; Cal. Penal Code § 1170.1(e).

California also enacted a limited number of alternative sentencing schemes. These move a defendant from the offense-specific base range into an enhanced sentencing base range. For example, under the "One Strike" law, if a defendant commits an enumerated sex offense under specified circumstances, such as kidnapping, binding, or the forcible administration of drugs, the applicable base punishment is a life term. Cal. Penal Code § 667.61. As with enhancements, California law requires that the facts triggering the alternate sentencing scheme be pleaded and proved to a jury beyond a reasonable doubt. See, *e.g.*, Cal.

---

[3] Enhancement statutes include California Penal Code sections 667.9 and 667.10 (elderly, young, or disabled victim), 12022 (armed with a firearm and using a deadly or dangerous weapon), 12022.1 (commission of offense while released on bail or own recognizance), 12022.5-12022.55 (use or discharge of a firearm), 12022.6 (amount of property loss), 12022.7 and 12022.8 (infliction of great bodily injury), 12022.75 (administering a controlled substance against the victim's will), 12022.9 (infliction of injury on a pregnant woman, resulting in termination of the pregnancy), and California Health and Safety Code section 11370.4 (amount of controlled substance).

Penal Code § 667.61(i); *People* v. *Mancebo*, 27 Cal. 4th 735, 744-50, 41 P.3d 556, 561-65, 117 Cal. Rptr. 2d 550, 557-61 (2002).

Finally, California defines some felonies with alternative base ranges depending upon the existence of specified facts. For example, California Penal Code section 245 provides for a standard base range of "two, three, or four years" for aggravated assaults committed with a deadly weapon or by use of force likely to produce great bodily injury. *Id.* § 245(a)(1). If the defendant uses a machine gun in committing the assault, the base range is "4, 8, or 12 years." *Id.* § 245(a)(3). If the assault involves a semiautomatic firearm, the base range is "three, six, or nine years." *Id.* § 245(b). If the assault is against a police officer or firefighter engaged in the performance of his or her duties, the base range is "three, four, or five years." *Id.* § 245(c). Again, each fact that changes the base range is an element that must be proved to the jury beyond a reasonable doubt. See, *e.g.*, Judicial Council of California Criminal Jury Instructions (CALCRIM) (2006) No. 875 (defining aggravated assault including additional elements for aggravated assault with a machine gun or semiautomatic firearm), No. 860 (including additional elements for assault on a police officer or firefighter).

2. With respect to a base range, the trial court is legally authorized to impose any of the three terms based on the jury's verdict alone and is vested with the discretion to select the appropriate term in light of the defendant's conduct. *Black*, 35 Cal. 4th at 1257-58, 113 P.3d at 545, 29 Cal. Rptr. 3d at 753. The court "'may consider the record in the case, the probation officer's report, other reports . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further

evidence introduced at the sentencing hearing.'" *Id.* at 1248, 113 P.3d at 538-39, 29 Cal. Rptr. 3d at 745 (quoting Cal. Penal Code § 1170(b)). The court need not give reasons for imposing the middle term, but it "must state on the record the 'reasons for selecting the upper or lower term,' including 'a concise statement of the ultimate facts which the court deemed to constitute aggravation or mitigation justifying the term selected.'" *Id.* (quoting Cal. R. Ct. 4.420(e)).

In selecting an upper term, the court may not consider an element of the crime itself or an imposed enhancement, Cal. Penal Code § 1170(b); Cal. R. Ct. 4.420(c) & (d), because those are taken into account in setting the base-range triad. Aside from that, the court has considerable discretion. It may consider aggravating factors set out in the rules of court[4] and any "additional criteria reasonably related to the decision being made." Cal. R. Ct. 4.408(a); *People* v. *Brown*, 83 Cal. App. 4th 1037, 1043-44, 100 Cal. Rptr. 2d 211, 215-16 (2000). The "'circumstances' the sentencing judge may look to in aggravation or in mitigation of the crime . . . include 'practically everything which has a legitimate bearing' on the matter in issue." *People* v. *Guevara*, 88 Cal. App. 3d 86, 93, 151 Cal. Rptr. 511, 516 (1979) (citations omitted). The trial court also has broad discretion in weighing the aggravating and mitigating factors. *People* v. *Cattaneo*, 217 Cal. App. 3d 1577, 1588, 266 Cal. Rptr. 710, 716 (1990); *People* v. *Evans*, 141 Cal. App. 3d 1019, 1022, 190 Cal. Rptr. 633, 635 (1983). The court balances these factors "against each other in qualitative as

[4] California Rule of Court 4.421 enumerates typical circumstances in aggravation relating to the crime and the offender. California Rule of Court 4.423 enumerates typical circumstances in mitigation relating to the crime and the offender.

well as quantitative terms." *People* v. *Roe*, 148 Cal. App. 3d 112, 119-20, 195 Cal. Rptr. 802, 807-08 (1983); *People* v. *Oberreuter*, 204 Cal. App. 3d 884, 887, 251 Cal. Rptr. 522, 523 (1988), *disapproved on other grounds in People* v. *Walker*, 54 Cal. 3d 1013, 1022, 819 P.2d 861, 866, 1 Cal. Rptr. 2d 902, 907 (1991).

The court's discretion in selecting the term of the base range, while broad, "is guided by Penal Code section 1170, subdivision (b), which states that 'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.'" *Black*, 35 Cal. 4th at 1247, 113 P.3d at 538, 29 Cal. Rptr. 3d at 744; see also Cal. R. Ct. 4.420(b) ("Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation."). That limitation is not a threshold requirement that must be satisfied before the court can impose an upper term. Rather, it requires reasonableness in the trial court's exercise of discretion, *Black*, 35 Cal. 4th at 1255, 113 P.3d at 544, 29 Cal. Rptr. 3d at 751, implemented by the abuse of discretion standard of review, see *People* v. *Brown*, 83 Cal. App. 4th at 1044, 100 Cal. Rptr. 2d at 216; *People* v. *Roe*, 148 Cal. App. 3d at 119-20, 195 Cal. Rptr. at 807-08.

Applying an abuse of discretion standard is a means of requiring a reasonable sentence. The California Supreme Court has explained, "This [abuse of discretion] standard is deferential. But it is not empty. Although variously phrased in various decisions, it asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts." *People* v. *Williams*, 17 Cal. 4th 148, 162, 948 P.2d 429, 438, 69 Cal. Rptr. 2d 917, 926 (1998); see also *People* v. *Dent*, 38 Cal. App. 4th 1726, 1731, 45 Cal. Rptr.

2d 746, 749 (1995) ("[S]entencing discretion 'is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' As such, discretion is abused when it '"exceeds the bounds of reason, all of the circumstances being considered."'") (citations omitted); *People* v. *Evans*, 141 Cal. App. 3d at 1022, 190 Cal. Rptr. at 635 ("There was no abuse of that discretion here, as the record amply supports a finding the superior court considered all relevant factors and made a reasonable decision as to their relative weight.").[5] Consequently, the requirement in section 1170(b)—that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime"—as construed and implemented by the California courts, requires that the sentencing court's decision to impose an upper or lower term must be reasonable and recognizes that the decision to impose such a term in the absence of *any* factors in aggravation or mitigation is necessarily unreasonable. *Black*, 35 Cal. 4th at 1255, 113 P.3d at 544, 29 Cal. Rptr. 3d at 751.

3. Petitioner cannot plausibly argue, as was the case in *Apprendi* and *Blakely*, that his sentence represents an upward departure from the appropriate base range. California provides for jury trials for upward departures

---

[5] The federal courts have likewise equated reasonableness review with review for an abuse of discretion. See, *e.g.*, *United States* v. *Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (explaining reasonableness review "is akin to review for abuse of discretion"); *United States* v. *Reinhart*, 442 F.3d 857, 862 (5th Cir. 2006); *United States* v. *Lazenby*, 439 F.3d 928, 931-32 (8th Cir. 2006).

through enhancements or alternate sentencing schemes. Petitioner also does not dispute that the Constitution permits judges to conduct factfinding in imposing a sentence within the standard range for the offense.

Instead, petitioner attacks California's triad base-range system itself. Under *Apprendi* and *Blakely*, he argues that the "presumptive" midterm effectively constitutes a singular base term with the upper and lower terms acting as departure terms. To petitioner, the base range can *only be* the midterm, when actually the base range is the triad with all three terms available to the trial court based on the jury verdict alone. His challenge to California's triad base-range scheme fundamentally misinterprets not only the constraint imposed on the trial court's discretion by section 1170(b), but also the constitutional implications of that constraint under *Blakely* and *Booker*. As *Black* explained, section 1170(b) merely sets out a reasonableness constraint on the discretionary choice between three authorized sentencing options. Consequently, the upper term of the base triad is the "statutory maximum" as defined by the Sixth Amendment under *Apprendi*, *Blakely*, and *Booker*.

B. *Apprendi*, *Blakely*, And *Booker* Provide That The Statutory Maximum For Constitutional Purposes Is The Top Of The Offense-Specific Base Range That The Trial Court Is Legally Authorized To Impose, And Sentencing Based On Judicial Factfinding Is Permissible Within That Base Range

1. Under *Apprendi* v. *New Jersey*, 530 U.S. 466, a jury must determine any fact that increases the maximum sentence above the prescribed statutory maximum range for the charged offense. Such a fact is the functional

equivalent of an element of a greater offense encompassing the charged offense and the enhancement. *Id.* at 494 & n.19. *Apprendi* rejected the notion that the jury-trial right turned on how the State labels the fact, explaining that there is no distinction under the Sixth Amendment between "elements" and "sentence enhancements." *Id.* at 494 ("[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"); see also *id.* at 497 ("Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently."); *United States* v. *Booker*, 543 U.S. at 230-31 (discussing *Apprendi*).

Apprendi explained that the imposition of an enhancement based upon judicial findings conflicted with (1) the historic linkage between punishment and the statutory definition of the crime of which the defendant was convicted and (2) the consistent limitation on judges' discretion to operate within the limits of the prescribed legal penalties. *Apprendi*, 530 U.S. at 482-83. A judge's traditional exercise of sentencing discretion "was bound by the range of sentencing options prescribed by the legislature," *id.* at 481, and the judge's role in sentencing was "constrained at its outer limits by the facts alleged in the indictment and found by the jury," *id.* at 483 n.10. A defendant had to be able to "discern from the statute of indictment what maximum punishment conviction under that statute could bring," since "punishment was, by law, tied to the offense" and judges only "exercised sentencing discretion within a legally prescribed range." *Id.* at 483 n.10; see also *id.* at 478. Thus, an enhancement violates the Sixth Amendment right to a jury trial if it allows the judge, not the jury, to determine a fact that exposes the

defendant to a penalty exceeding the "prescribed range of penalties" beyond the statutory maximum for the offense established by the jury's verdict. *Id.* at 482-83, 490.

In *Blakely* v. *Washington*, 542 U.S. 296, the Court uncoupled the definition of "statutory maximum" for Sixth Amendment purposes from the sentence identified by the legislature as the statutory maximum for an offense. The constitutional inquiry focuses squarely on what sentence the trial court was legally authorized to impose based on the jury verdict alone. *Blakely* explained "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303-04 (citations omitted). In concrete terms, if the legislature establishes a base range for an offense, and creates departure statutes predicated on additional findings, the "statutory maximum" for *Apprendi* purposes is the *maximum of the base range*, and any facts necessary for departing from that base range are subject to the Sixth Amendment's jury-trial requirement, regardless of the legislature's definition of the statutory maximum for state sentencing purposes (i.e., regardless of the ultimate punishment ceiling imposed for the offense, taking into account possible enhancements and departures).

2. *Blakely* and *Apprendi* also reaffirmed that the Constitution countenances judicial factfinding within the statutory range authorized by the jury's verdict. *Apprendi* observed that nothing in the common law made it "impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and

offender—in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481. "[J]udges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." *Id.*; see also *Williams* v. *New York*, 337 U.S. 241, 246 (1949). Indeed, the term "sentencing factor" retains its relevance because judicial factfinding is constitutionally appropriate within a statutory base range. "[T]he term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Apprendi*, 530 U.S. at 494 n.19.[6]

Under *Apprendi* and *Blakely*, a fact that permits a judge to increase a defendant's sentence above the statutorily established base range for that offense is subject to the Sixth Amendment jury-trial right. See *Blakely*, 542 U.S. at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,'

---

[6] This Court in *Washington* v. *Recuenco*, ___ U.S. ___, 2006 WL 1725561, at *6 (2006), noted in passing that *Apprendi* "treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt." See also *id.* (noting the Court's "recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes"). *Recuenco*, however, did not reexamine that portion of *Apprendi* reaffirming the nonelemental nature of "sentencing factors" used for conducting judicial factfinding *within* an authorized range. The Court was not confronted in *Recuenco* with the validity of within-range sentencing factors. *Recuenco*'s statement equating "sentencing factors" with elements was directed at the improper use of judicially found "sentencing factors" to impose a sentence *above* the authorized statutory maximum and does not call into question *Apprendi*'s approval of the use of sentencing factors for within-range judicial factfinding. See *Apprendi*, 530 U.S. at 494 n.19.

. . . and the judge exceeds his proper authority."); see also *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."); *United States* v. *Booker*, 543 U.S. at 244 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); cf. *id.* at 231 (explaining *Jones* v. *United States*, 526 U.S. 227, 251 n.11 (1999), foreshadowed a " 'rule requiring jury determination of facts that raise a sentencing ceiling' in state and federal sentencing guidelines systems"). Concomitantly, a system that allows the judge to make factual findings in selecting a term within an authorized range is constitutionally permissible. *Apprendi*, 530 U.S. at 481; *Blakely*, 542 U.S. at 309; *Booker*, 543 U.S. at 233.

3. At their core, *Apprendi* and *Blakely* focus on the sentence a State *legally authorizes* the trial court to impose based on the jury verdict alone. In *Apprendi*, *Ring*, *Blakely*, and *Booker*, the trial court was not legally authorized to impose the sentence it selected without an additional predicate factual determination. Under New Jersey law, the jury verdict alone in *Apprendi* authorized only a base range of five to ten years, not the twelve-year term imposed by the court. *Apprendi*, 530 U.S. at 468-70, 475. Under Arizona law, the jury verdict alone in *Ring* authorized only a life sentence as the base term, not the death sentence imposed by the court. *Ring* v. *Arizona*, 536 U.S. at 597, 602-04. Under Washington law, the jury verdict alone in *Blakely* authorized only a "standard" base range of forty-nine to fifty-three months, not the ninety-month

exceptional sentence imposed by the court. *Blakely*, 542 U.S. at 303-04. And under federal law, the jury verdict alone in *Booker* authorized only a base range of 210 months to 262 months, not the 360-month sentence imposed by the court. *Booker*, 543 U.S. at 235. The key constitutional question, then, is not what sentence the State *labels* the statutory maximum, but what base range the State makes legally available to the trial court from the verdict alone.

A State's interpretation of its sentencing law sets the base line for determining when constitutional requirements come into play to preclude judicial factfinding. See *Ring* v. *Arizona*, 536 U.S. at 597-603 (explaining that the state court's interpretation of what sentence the jury verdict alone legally allowed was "authoritative," and overturning prior approval of Arizona's capital sentencing system in light of the state court's clarification that the jury's verdict alone did not authorize a death sentence). Once state law establishes the base range legally available to the trial court from the verdict, the statutory maximum for constitutional purposes is fixed at the top of that base range. A State may not thereafter avoid the constitutional requirements that flow from the identification of the base range by labeling a higher sentence the "statutory maximum" and allowing the court to rely on additional facts to reach a sentence *greater* than the permissible base range. At the same time, the Sixth Amendment does not limit judicial factfinding in selecting a term *at or below* the maximum of the base range the State legally authorizes for the offense. Applying this analysis, California's determinate sentencing system fully satisfies Sixth Amendment requirements.

C. Under California's Determinate Sentencing Law, The Upper Term Sentence Is The Statutory Maximum For *Blakely* Purposes Because Trial Courts Are Legally Authorized To Impose That Term Based On The Jury Verdict Alone

1. California's determinate sentencing law does not suffer from the constitutional flaws identified in *Apprendi* and *Blakely*. Under state law, the trial court is legally authorized to impose any of the three terms of the base-range triad based on the jury verdict alone. *Black*, 35 Cal. 4th at 1257-58, 113 P.3d at 545, 29 Cal. Rptr. 3d at 753. *Black*'s holding is merely the most recent manifestation of California's longtime recognition of the constitutional distinction between permissible judicial factfinding *within* the legally available base range, and jury factfinding necessary to authorize the court to impose a sentence *above* the base range. California consistently has acknowledged that the constitutional touchstone for distinguishing between the available base range and sentence enhancements is the scope of sentencing options the trial court is legally authorized to impose based on the verdict alone. Under the State's sentencing law, judicial factfinding in selecting a term from the triad base range is permissible precisely because all three terms are legally available to the trial court based on the jury verdict on the offense alone, whereas "enhancements," which add to the base range, must be proved to a jury beyond a reasonable doubt. *Black*, 35 Cal. 4th at 1257-58, 113 P.3d at 545, 29 Cal. Rptr. 3d at 753; cf. *Apprendi*, 530 U.S. at 488 n.14 (citing *Monge* v. *California*, 524 U.S. 721 (1998), as acknowledging that California provides procedural safeguards, including the right to a jury trial and proof beyond a reasonable doubt, before imposing alternate sentencing scheme even when

such protections are not constitutionally mandated under *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)).

California adopted a rule fundamentally indistinguishable from *Apprendi* in *People* v. *Hernandez*, 46 Cal. 3d 194, 757 P.2d 1013, 249 Cal. Rptr. 850 (1988), *overruled on other grounds in People* v. *King*, 5 Cal. 4th 59, 78 n.5, 851 P.2d 27, 39 n.5, 19 Cal. Rptr. 2d 233, 245 n.5 (1993). In *Hernandez*, the defendant was convicted of kidnapping and rape. At sentencing the court imposed a three-year enhancement for kidnapping committed for the purpose of rape, which had not been charged or found true by the jury beyond a reasonable doubt. *Id.* at 199, 757 P.2d at 1015, 249 Cal. Rptr. at 852. *Hernandez* rejected the claim that the factual inquiry underlying the enhancement—whether the kidnapping was "for the purposes of rape"—was nothing more than a "sentencing fact" that need not be charged or proved to the jury. Instead, *Hernandez* anticipated *Apprendi* by focusing on what sentencing options were legally available to the trial court based on the jury's verdict alone:

> In the present case, the jury's verdict simply did not make the three-year term . . . available to the sentencing judge to impose. . . . It was not one of the available punishments the court could impose as part of the sentencing package because the section's essential requirement, that the kidnapping must have been perpetrated for the purpose of committing one of the specified sex offenses, had not been established by the trier of fact.

Id. at 205, 757 P.2d at 1019, 249 Cal. Rptr. at 856; see also *id.* at 208, 757 P.2d at 1021, 249 Cal. Rptr. at 858 (holding Constitution compelled pleading and proof requirement for

any fact serving as basis for imposing a sentence not otherwise available based on jury verdict alone).

Having recognized the same rule undergirding *Apprendi* and *Blakely*—that the pleading, proof, and jury-trial requirements turned on whether the additional sentence to be imposed was legally available to the court based on the jury's verdict alone—*Hernandez* explained that factfinding for sentence enhancements differs from factfinding in selecting a term from the base-range triad. This difference arises because all the terms in the base-range triad *are* legally available to the trial court based on the jury's verdict for the relevant offense, whereas enhancements are not. *Hernandez*, 46 Cal. 3d at 205, 757 P.2d at 1019, 249 Cal. Rptr. at 856. The failure to recognize this distinction was the flaw in the trial court's decision to impose an uncharged enhancement.

> [That analysis] fails to distinguish a trial court's decision in fashioning appropriate punishment from the need to establish before the trier of fact the wrongful criminal conduct for which punishment is being imposed. "Sentencing facts" such as aggravating and mitigating circumstances assist a judge in selecting from among the options of punishment the trier of fact's verdict has made available. They help the court select, for example, the higher, middle or lower term and whether terms should be consecutive or concurrent. Such factors are largely the articulation of considerations sentencing judges have always used in making these decisions.

Id. at 205, 757 P.2d at 1019, 249 Cal. Rptr. at 856.

2. The distinction between sentencing within the base range and imposing a term not provided for by the verdict is further reflected in California's application of its forfeiture rules. Under California law, most claims of

sentencing error are forfeited if the defendant failed to object at sentencing. However, a claim that the sentence imposed by the court was "legally unauthorized" is never forfeited, regardless of a failure to object. *People* v. *Scott*, 9 Cal. 4th 331, 353-54, 885 P.2d 1040, 1053-54, 36 Cal. Rptr. 2d 627, 640-41 (1994). A sentence is legally "'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case," such as "where the court violates mandatory provisions governing the length of confinement." *Id.* at 354, 885 P.2d at 1054, 36 Cal. Rptr. 2d at 641. By contrast, claims subject to forfeiture "involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." *Id.*

Notably, the trial court's failure to find aggravating factors to justify an upper term is error subject to forfeiture. *Scott*, 9 Cal. 4th at 353, 885 P.2d at 1053, 36 Cal. Rptr. 2d at 640 ("We conclude that the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons."). This application of the forfeiture rule reflects that, even absent any aggravating factors, the upper term is not a "legally unauthorized" sentence. Rather, an upper term in the absence of such findings is an authorized sentence merely imposed in a "procedurally or factually flawed

manner." *Id.* at 353-54, 885 P.2d at 1053-54, 36 Cal. Rptr. 2d at 640-41.[7]

California habeas corpus law also reflects the distinction. A defendant may challenge an unauthorized sentence by way of a collateral attack on the judgment. See, *e.g.*, *In re Harris*, 49 Cal. 3d 131, 134 n.2, 775 P.2d 1057, 1059 n.2, 260 Cal. Rptr. 288, 290 n.2 (1989) ("Habeas corpus will lie when the trial court 'exceeded its jurisdiction by sentencing a defendant "to a term in excess of the maximum provided by law," or to correct a misinterpretation of [a] statute resulting in confinement "in excess of the time allowed by law". . . .'" (citation omitted)); *People* v. *Miller*, 6 Cal. App. 4th 873, 877, 8 Cal. Rptr. 2d 193, 195 (1992) ("A writ of habeas corpus 'will always issue to review an invalid sentence, when, without the redetermination of any facts, the judgment may be corrected to accord with the proper determination of the circumstances.'"). However, a collateral challenge does not lie to compel findings of aggravating factors for an upper term sentence. See *People* v. *Olken*, 125 Cal. App. 3d 1064, 1067-68, 178 Cal. Rptr. 497, 499 (1981) ("The sentence itself was authorized by law. Consequently, the court did not exceed its jurisdiction in imposing it. In sum, a failure to comply with the duty to articulate a reason or reasons for a sentence choice does not render a final judgment susceptible to collateral attack.").

---

[7] A footnote in *Scott* stated that an upper or lower term was a "departure" from the midterm. *Scott*, 9 Cal. 4th at 350 n.13, 885 P.2d at 1051 n.13, 36 Cal. Rptr. 2d at 638 n.13. But that word was used prior to *Apprendi* or *Blakely*, and thus without an appreciation that it might take on special significance. This footnote dictum does not undercut the principle derived from the body of the opinion that all three terms of the base range are legally available based on the verdict alone.

Black, *Hernandez*, and *Scott* make clear that California legally authorizes its trial judges to select any of the three terms in the crime-specific base range, including the upper term, based on the jury verdict alone. Thus, the defendant cannot be said to have "a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Blakely*, 542 U.S. at 309; see also *United States* v. *Booker*, 543 U.S. at 233 ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

3. This point also distinguishes the upper term sentence at issue here from the exceptional sentence invalidated in *Blakely*. Under Washington law, the trial court was not legally authorized to depart from the standard range of forty-nine to fifty-three months without additional factual findings. *Blakely*, 542 U.S. at 304-05 (noting Blakely's departure term "involved a sentence greater than what state law authorized on the basis of the verdict alone"); see also *id.* at 305 ("[I]t remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority [to depart from the standard range] only upon finding some additional fact."); *Booker*, 543 U.S. at 232 ("We rejected the State's argument that the jury verdict was sufficient to authorize a sentence within the general 10-year sentence for Class B felonies, noting that under Washington law, the judge was *required* to find additional facts in order to impose the greater 90-month sentence."). By contrast, California law makes the upper term a component of the "standard range," not a departure from it, and the trial court *is* legally authorized under state law to impose the upper

term based on the jury verdict alone. Consequently, petitioner's sentence, at the upper term of the base range, is not comparable to the departure sentence found unconstitutional in *Blakely*.

4. Not only did California anticipate *Apprendi* and *Blakely* by internalizing the Sixth Amendment rule into its sentencing system, California's determinate sentencing law avoids the policy concerns animating that jurisprudence. *Booker* explained that the driving force behind those decisions was the need to check the growing "trend of legislative regulation of sentencing" in which legislatures selected facts to be determined by a judge at sentencing "that not only authorized, or even mandated, heavier sentences than would otherwise have been imposed, but increased the range of sentences possible for the underlying crime." *Booker*, 543 U.S. at 236; see also *id.* at 237 ("[T]he Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances."). This new trend in sentencing upset the historic balance between the role of the jury in circumscribing the defendant's culpability through the verdict on the charged offense and the role of the judge in setting punishment commensurate with that culpability. "The effect of the increasing emphasis on facts that enhanced sentencing ranges . . . was to increase the judge's power and diminish that of the jury." *Id.* at 236. "As the enhancements became greater, the jury's finding of the underlying crime became less significant." *Id.* The Court acted to prevent the usurpation of the jury's function through the device of shifting elemental facts into judge-determined enhancements.

> The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between

> the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in *Jones* and developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.

Id.

California's determinate sentencing law does not represent judicial usurpation of the jury's role. While in 1977 California shifted from indeterminate terms to legislative identification of facts that enhance punishments beyond the base range or that enhance the applicable base range itself, the State never diminished the role of the jury. To the contrary, California's determinate sentencing law jealously safeguarded the role of the jury by mandating that *any* fact that supports an increase above the base range—as by enhancements and alternate sentencing schemes—be pleaded and proved to the jury beyond a reasonable doubt. *Black*, 35 Cal. 4th at 1257, 113 P.3d at 545, 29 Cal. Rptr. 3d at 752-53. Unlike the systems criticized in *Apprendi*, *Blakely*, and *Booker*, California's system maintains the traditional role of the jury in circumscribing the scope of criminal culpability by restricting the trial court to a selection of the most appropriate term among the three terms of the relevant base range for the crime found by the jury. Unlike this within-the-base-range factfinding, all other factfinding increases a defendant's sentence above the statutory maximum, either through

enhancements or alternative sentencing schemes, and is reserved for the jury.[8]

5. Another concern underlying *Apprendi* and *Blakely* is that systems which eliminate the jury's role in assessing facts used to enhance a sentence above the crime-specific base range weaken the historic link between crime and punishment by failing to provide notice or any degree of certainty as to what punishment could be expected for committing the underlying offense. See *Apprendi*, 530 U.S. at 478 ("The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime."). This concern does not infect California's sentencing system either. A California defendant has full notice that he or she risks the upper term sentence for any given felony because the upper term is one of the three possible terms of the base range that appears either in the very code section or set of code sections that enumerate the elements of the offense or in the catch-all triad in California Penal Code section 18. For example, California Penal Code section 288.5 expressly provides that anyone committing petitioner's offense "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." A defendant in California can "discern from the statute of indictment what maximum punishment conviction under that statute could bring." *Apprendi*, 530 U.S. at 483 n.10. Unlike the

---

[8] California also allocates to the trial court a limited number of additional factfinding responsibilities in making discretionary choices which are not implicated by the instant case. See, *e.g.*, Cal. Penal Code §§ 17 (court may reduce a "wobbler" offense from a felony to a misdemeanor), 1203 (decision to stay sentence and order probation), 1169 (decision to impose concurrent or consecutive sentences), 1202.4 (amount of restitution fine).

systems criticized in *Apprendi* and *Blakely*, in which a defendant "with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon" at sentencing, *Blakely*, 542 U.S. at 311, the upper term *never* constitutes an unheralded increase in a defendant's sentence in California.

California's sentencing system fully satisfies this Court's Sixth Amendment jurisprudence. Any fact necessary to impose an enhancement or sentencing scheme that increases the sentence beyond the maximum of the base range must be charged, presented to the jury, and found true beyond a reasonable doubt. By contrast, the sentencing considerations at issue in this case fall within the class of facts the trial court looks to in exercising its discretion to select a term within the base-range triad. These considerations are properly classified as permissible "sentencing factors," *Apprendi*, 530 U.S. at 494 n.19, which constitutionally may be found by the judge to select a term within the legislatively prescribed base range for the offense based on the verdict alone, *id.*; *Williams* v. *New York*, 337 U.S. at 246.

D. California Penal Code Section 1170(b), Which Functions As A Reasonableness Constraint On The Trial Court's Decision To Impose The Upper Term, Does Not Render The Upper Term Legally Unavailable Based On The Verdict Alone

Petitioner counters that section 1170(b) makes the midterm the presumptive term, and requires additional findings to deviate from that term. He views section 1170(b) as mandating a two-step sentencing procedure whereby the trial court starts with the midterm and moves up or down from that term based on additional findings of facts either in aggravation or mitigation. On this basis,

petitioner claims that only the midterm sentence is legally available to the trial court based on the jury verdict alone. Pet'r Br. 18-20.

1. Petitioner's attempt to equate section 1170(b) with the statutory provisions in *Blakely* is unavailing. Section 1170(b) differs fundamentally from Washington's statutory provisions. Washington's scheme identified a general ten-year maximum for a broad range of felonies, then applied separate statutory provisions describing an alternative lower "standard range" based on various factors, which for Blakely resulted in an offense-specific standard range of forty-nine months to fifty-three months. *Blakely*, 542 U.S. at 299. Section 1170(b) neither sets out a separate "standard range," nor creates a lower offense-specific alternative that supplants the triad range specifically linked to each offense in California.

2. Moreover, section 1170(b) nowhere limits the trial court's *authority* to impose an upper term. The fallacy in petitioner's argument is that his cramped interpretation of section 1170(b) conflicts with the broader construction given that statute by the California Supreme Court. As *Black* made clear, the trial court is legally authorized to select any of the three terms based on the verdict alone. Section 1170(b) is not a threshold factfinding requirement, but rather is a reasonableness constraint on the trial court's ultimate sentencing decision.

Indeed, petitioner's claim reflects a fundamentally flawed view of the sentencing process in California. That process does not begin at a presumptive midpoint with judicial findings required to deviate upwards or downwards. Instead, the trial court always has all three sentencing options available to it and selects the appropriate one based on its consideration of all relevant criteria relating to the offense and offender. The process begins

with the court guided, not constrained, by the factors enumerated in the California Rules of Court, as well as by the probation officer's report, other relevant reports, statements by the victim and the defendant, and statements and arguments submitted by the parties. The court uses this information to conduct a quantitative and qualitative weighing of circumstances in aggravation and mitigation, to determine whether, on balance, the defendant's crime is typical, or more aggravated or mitigated. Only then, after evaluating and balancing the relevant circumstances, does the court decide which of the three terms to impose as appropriately reflecting the defendant's level of culpability. Cf. *People* v. *Stevens*, 205 Cal. App. 3d 1452, 1457, 253 Cal. Rptr. 173, 177 (1988) (rejecting an overly "rigid" view of the "mechanics of sentencing" and observing that the judge may take every factor into account in selecting an appropriate sentence, including his "subjective belief regarding the length of the sentence to be imposed," provided the court's evaluation "is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria"); see also *People* v. *Burbine*, 106 Cal. App. 4th 1250, 1260, 131 Cal. Rptr. 2d 628, 635 (2003) ("In selecting the middle term as the principal term at the initial sentencing, the trial court here did not, as appellant suggests, 'acquit' him of the upper term. It did no more than find that the totality of the circumstances justified the selection of that particular term.").

California courts reject efforts to transform sentencing decisions into a mechanical set of rules that curtail sentencing discretion.

> "Mandatory, arbitrary or rigid sentencing procedures invariably lead to unjust results. Society receives maximum protection when the penalty,

> treatment or disposition of the offender is tailored to the individual case. Only the trial judge has the knowledge, ability and tools at hand to properly individualize the treatment of the offender. Subject always to legislative control and appellate review, trial courts should be afforded maximum leeway in fitting the punishment to the offender."

People v. *Savala*, 147 Cal. App. 3d 63, 69, 195 Cal. Rptr. 193, 196 (1983) (quoting *People* v. *Williams*, 30 Cal. 3d 470, 482, 637 P.2d 1029, 1035, 179 Cal. Rptr. 443, 449 (1981)).

California has rejected an interpretation of section 1170(b) as establishing the starting point for a court's sentencing decision. Rather, section 1170(b) is a constraint imposed *after* the court has considered all of the available information. The California Supreme Court reaffirmed in *Black* that section 1170(b)'s requirement establishes a "reasonableness" constraint on an otherwise available sentencing choice. *Black*, 35 Cal. 4th at 1255, 113 P.3d at 544, 29 Cal. Rptr. 3d at 751 ("Although [section 1170(b)] is worded in mandatory language, the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be *reasonable*.").[9]

Section 1170(b) is a legislative recognition that to impose the statutory maximum—the most aggravated term possible in a base range—in the complete absence of identified factors or reasons justifying such a term, would

---

[9] California Rule of Court 4.420(b) provides, "Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." Given that section 1170(b) sets out a reasonableness constraint, the term "justified" in its implementing rule is properly understood as "reasonable" as opposed to "legally authorized." See Cal. Const., art. VI, § 6 (rules "shall not be inconsistent with statute").

be an abuse of discretion and necessarily unreasonable. This recognition flows from the fact that the choice among the three legislatively prescribed sentences is entirely discretionary. The court's sentencing decision may be based on *any* circumstance in aggravation or mitigation, whether or not specifically enumerated in the rules of court, and, apart from facts elemental to the crime already accounted for in the legislatively designated triad, may "include 'practically everything which has a legitimate bearing' on the matter in issue." *People* v. *Guevara*, 88 Cal. App. 3d at 93, 151 Cal. Rptr. at 516; see also *Black*, 35 Cal. 4th at 1255, 113 P.3d at 544, 29 Cal. Rptr. 3d at 751; Cal. R. Ct. 4.408(a). The court can rely on essentially any reason placing the defendant's particular offense outside the mean when selecting within the sentencing range. Conversely, if no such reason exists, it is unreasonable and an abuse of discretion for the trial court to choose the upper or, for that matter, the lower term.

3. Petitioner's focus on the labeling of California's midterm as a "presumptive term" is also misleading. State law recognizes the midterm as the usual or typical term for each species of offense to promote policy goals of eliminating sentencing disparity and facilitating uniformity of sentences. See Cal. Penal Code § 1170(a). The label "presumptive term" derives from the fact that, as the usual (or legislatively preferred) term, a court need not explain why it has selected that term, whereas it must explain its balancing process on the record for imposing an upper or lower term. See Cal. Penal Code § 1170(b) (no statement of reasons need be given when imposing the midterm). The procedure for selecting the midterm, however, remains the same as for the upper and lower terms of the triad. The trial court is required to evaluate

available materials and balance aggravating and mitigating factors. If, at the conclusion of the balancing process, the court determines the midterm is appropriate, it need not explain the selection of that term on the record in a statement of reasons. But the trial court's decision to impose the midterm remains subject to review for abuse of discretion. See, *e.g.*, *Cattaneo*, 217 Cal. App. 3d at 1587-88, 266 Cal. Rptr. at 716; *People* v. *Knowlden*, 171 Cal. App. 3d 1052, 1058-59, 217 Cal. Rptr. 758, 761 (1985).

> [Consequently,] even though section 1170, subdivision (b) can be characterized as establishing the middle term sentence as a presumptive sentence, the upper term is the "statutory maximum" for purposes of Sixth Amendment analysis. The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. The judicial factfinding that occurs during that selection process is the same type of judicial factfinding that traditionally has been a part of the sentencing process. Therefore, the upper term is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict* . . . ."

Black, 35 Cal. 4th at 1257-58, 113 P.3d at 545, 29 Cal. Rptr. 3d at 753. The California Supreme Court's interpretation of California statutory law is binding on this Court. *Ring* v. *Arizona*, 536 U.S. at 597-603; *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983); *Garner* v. *Louisiana*, 368 U.S. 157, 166 (1961).

Petitioner retorts that *Black*'s discussion of the discretion available to the sentencing court invokes a rationale "repudiated" by this Court. Pet'r Br. 29. *Black*, he suggests, ignores this Court's statements that it makes no difference that "the judicially determined facts *require* a sentence enhancement or merely *allow* it, [if] the verdict alone does not authorize the sentence," and that it is "immaterial" that the trial court may rely on "*any* aggravating fact," if the court must still find a fact to gain the authority to impose a particular departure term. Pet'r Br. 27-29 (citing *Blakely*, 542 U.S. at 305 & n.8). True, the availability of discretion and the amount of discretion in the process of finding a *required* fact does not obviate the constitutional problem if that fact must be found *before* the court has legal authority to impose the departure sentence. However, the amount of discretion the court has in imposing a sentence that *is already* legally available, and how the court exercises that discretion, is very relevant when evaluating the *reasonableness* of the court's ultimate decision. It was in this latter context, not the former, that *Black* emphasized the amount and quality of the trial court's discretion.

Accordingly, under section 1170(b), all three statutorily enumerated sentencing choices are available to the judge based on the jury's verdict alone. Judicial factfinding in support of an exercise of discretion occurs *within* the available base range, not outside it.

E. *Booker* Establishes That A Reasonableness Constraint On The Trial Court's Ultimate Discretion To Select Punishments Within A Range Does Not Alter The Legal Availability Of The Terms Within The Range

What question remains is whether the reasonableness constraint of section 1170(b) renders the trial court's otherwise permissible factfinding unconstitutional. *United States* v. *Booker*, 543 U.S. 220, dictates that the answer to this question is no.

Booker fleshed out the Sixth Amendment jury trial analysis of *Apprendi* and *Blakely*. Under *Booker*, a threshold constraint on the court's sentencing authority triggers the Sixth Amendment jury-trial right. A reasonableness constraint on the court's ultimate sentencing decision does not. That distinction is what separates the reformed Federal Sentencing Guidelines from the mandatory Guidelines. It also distinguishes California's reasonableness constraint in section 1170(b) from the threshold factual requirements in Washington's exceptional sentence provision.

Booker held the Guidelines unconstitutional as measured against *Blakely*. *Booker* reaffirms, however, that a trial court properly may make discretionary determinations based on sentencing factors in selecting an appropriate term within a prescribed range. *Booker*, 543 U.S. at 233 ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); see also *id.* ("For when a trial judge exercises his discretion to

select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

The Guidelines as reformed in *Booker* are an exemplar of a sentencing scheme in which the court, not the jury, finds aggravating and mitigating circumstances without violating the Sixth Amendment. The sentencing court must consider but is not bound by the Guidelines. *Booker*, 543 U.S. at 259-64. But judicial factfinding is still fettered in this sense: the sentence must be "reasonable" in relation to all of the applicable factors in order to survive appellate review. *Id.* at 261-63. Under the reformed Guidelines, a district court is not free to impose the maximum term in the crime's range *irrespective* of the presence or absence of aggravating circumstances. Rather, any significant departure from the now-advisory Guidelines range must be reasonable in relation to the presence of aggravating factors set out in the Guidelines and in consideration of other statutory concerns set out in 18 U.S.C. § 3553(a). *Booker*, 543 U.S. at 245-46, 261-63.

1. California's determinate sentence system complies with *Booker*'s constitutional structure

California sentencing law, as elucidated by *Black*, is consistent with the structure and scheme found constitutional in the remedial portion of *Booker*. Upon a defendant's conviction, all three terms of the base range are available sentencing choices. The court's exercise of discretion in selecting a term is guided by the California Rules of Court, which enumerate a nonexclusive, advisory list of aggravating and mitigating factors. And the court's decision, after considering all of the relevant criteria is reviewed for abuse of discretion, a reasonableness constraint on the court's ultimate sentencing decision. The

nature and quality of discretion accorded a California sentencing court is constitutionally equivalent to the discretion given a federal district court in selecting a term after consideration of the now-advisory Federal Sentencing Guidelines. For constitutional purposes, the constraints on a California court operate in essentially the same manner as those imposed under the advisory Guidelines. See *Booker*, 543 U.S. at 259 ("Without the 'mandatory' provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals.").

Similarly, California's legislative preference for the midterm as the usual term does not violate the Constitution. *Booker* recognized the importance of respecting the legislature's role in identifying sentencing preferences that must be considered by the courts in order to achieve uniformity in sentencing. *Booker*, 543 U.S. at 249-56; see *United States* v. *Cage*, ___ F.3d ___, 2006 WL 1554674, at *8 (10th Cir. 2006) ("*Booker* does not place original sentencing decisions entirely in the discretion of trial judges; the Guidelines—as an expression of the political will of Congress—continue to assert advisory influence on those decisions. Similarly, *Booker* should not be interpreted to exempt appellate courts from the influence of Congress's sentiments about reasonableness in sentencing."). Indeed, the driving force behind *Booker*'s interpretation of the Guidelines was recognition of the need to preserve as much of the system as possible to ensure the statutory scheme would achieve Congress's desired goal of uniformity based on the defendant's real conduct. *Booker*, 543 U.S. at 250-51.

Ultimately, there is only one distinction between California's reasonableness constraint set out in section 1170(b) and that articulated in *Booker*. Section 1170(b)

embodies an explicit conclusion that imposing the statutory maximum in the absence of any justification always is unreasonable and an abuse of discretion, whereas that conclusion is implicit in *Booker*'s "review for unreasonable[ness]." This distinction is not constitutionally meaningful. Although *Booker* does not expressly spell out that a maximum term imposed absent any justification is necessarily unreasonable, this principle is nonetheless an implicit and integral part of *Booker*'s reformed Guidelines scheme. Accordingly, the fact that California does spell out this constraint in section 1170(b) does not render California's sentencing scheme unconstitutional.

2. *Booker*'s reasonableness review requirement effectively mandates a federal court not impose the statutory maximum sentence in the absence of any justification beyond the fact of the crime

The twin mandates of *Booker*—that the district court "must take account of" the sentencing Guidelines and policy considerations set out in 18 U.S.C. § 3553(a) in selecting a sentence and that the court's selection ultimately must be reasonable—lead inexorably to the same conclusion as that embodied in section 1170(b). The Guidelines are now advisory, but continue to inform and channel the district court's sentencing discretion. As a district court departs further from the advisory Guidelines range along the sentencing spectrum toward the statutory maximum, the court must provide justification to demonstrate why the defendant's real conduct falls outside the preferred sentence range for the crime. If the court points to no facts justifying the deviation from the legislatively preferred sentencing choices, the reasonableness of the court's decision to sentence above the Guidelines range progressively diminishes as the deviation increases. A

substantial deviation, *without any justification*, would inevitably be unreasonable. Although under the reformed Guidelines system it is unnecessary to identify at what point an upward variance, without any facts in support, becomes unreasonable, that point necessarily occurs below the statutory maximum, or else the reasonableness review constraint becomes meaningless. Cf. *Martin* v. *Franklin Capital Corp.*, ___ U.S. ___, 126 S. Ct. 704, 710 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."); see also *Milwaukee* v. *Cement Div., National Gypsum Co.*, 515 U.S. 189, 196 n.8 (1995) ("[A]s is always the case when an issue is committed to judicial discretion, the judge's decision must be supported by a circumstance that has relevance to the issue at hand.").

Decisions of the federal circuit courts that have applied *Booker*'s reasonableness constraint generally reflect this conclusion. First, those courts have recognized that the Guidelines embody controlling policy determinations as to which sentencing levels constitute the appropriate degree of punishment for a defendant's real conduct in the vast majority of cases, to which policies the district courts must defer. A majority of the circuits have integrated such deference into their reasonableness analysis by adopting a "presumption of reasonableness" for sentences imposed within the advisory Guidelines range. See, *e.g.*, *United States* v. *Johnson*, 445 F.3d 339, 341 (4th Cir. 2006); *United States* v. *Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States* v. *Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States* v. *Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States* v. *Lincoln*, 413 F.3d 716, 717-18 (8th Cir. 2005); *United States* v. *Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006); cf. *United States* v. *Talley*, 431 F.3d

784, 788 (11th Cir. 2005) (noting that sentences within the advisory guidelines "ordinarily" will be reasonable). But see *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); *United States* v. *Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *United States* v. *Cooper*, 437 F.3d 324, 331-32 (3d Cir. 2006); *United States* v. *Zavala*, 443 F.3d 1165, 1168-70 (9th Cir. 2006) (rejecting a district court presumption of reasonableness). The remaining circuits have declined to apply a presumption of reasonableness to within-Guidelines sentences, but still give appropriate deference to the policy determinations inherent in the Guidelines by holding that the Guidelines serve as the starting point for the court's exercise of discretion in selecting an appropriate sentence. See, *e.g.*, *Jiménez-Beltre*, 440 F.3d at 518-19 (explaining district court should first calculate Guidelines range as the starting point and then consider whether "other factors identified by either side warrant an ultimate sentence above or below the Guideline range"); *United States* v. *Mix*, 450 F.3d 375, 381 (9th Cir. 2006) (same).

Second, the circuit courts consistently use the Guidelines range as the yardstick for measuring the reasonableness of a district court's sentencing decision. Those circuit courts analyzing the reasonableness standard applied to non-Guidelines sentences have recognized that greater deviations from the Guidelines recommendations require concomitantly greater justification to survive review.

> Sentences deviating from the guideline range can be reasonable so long as the judge offers appropriate justification under the factors specified in Section 3553(a). The further the district court varies from the presumptively reasonable guideline range, the more compelling the justification based on the 3553(a) factors must be. An extraordinary

> reduction [or increase] must be supported by extraordinary circumstances.

United States v. *Bryant*, 446 F.3d 1317, 1319 (8th Cir. 2006) (citations omitted); see also *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005) ("[T]he farther the judge's sentence departs from the guidelines sentence (in either direction—that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed."); *United States* v. *Cage*, ___ F.3d ___, 2006 WL 1554674, at *9 (10th Cir. 2006) ("Because this case presents such an extreme divergence from the best estimate of Congress's conception of reasonableness expressed in the Guidelines, it should be considered reasonable only under dramatic facts."); *United States* v. *Hampton*, 441 F.3d 284, 288 (4th Cir. 2006) ("The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be."); *United States* v. *Smith*, 440 F.3d 704, 707 (5th Cir. 2006) ("Additionally, the district court must more thoroughly articulate its reasons when it imposes a non-Guideline sentence than when it imposes a sentence under authority of the Sentencing Guidelines. These reasons should be fact-specific and consistent with the sentencing factors enumerated in section 3553(a). The farther a sentence varies from the applicable Guideline sentence, 'the more compelling the justification based on factors in section 3553(a)' must be.") (citations omitted); *United States* v. *Smith*, 445 F.3d 1, 4 (1st Cir. 2006) (same, quoting *Dean*); *United States* v. *Simpson*, 430 F.3d 1177, 1187 n.10 (D.C. Cir. 2005) (quoting *Dean*); cf. *United States* v. *Mix*, 450 F.3d at 381 (noting judge must "calculate the range accurately

and explain why (if the sentence lies outside it) this defendant deserves more or less").

The circuit courts' recognition that *Booker* ties the reasonableness of an aggravated sentence to the level of justification offered by the trial court demonstrates that *Booker*'s reasonableness constraint encompasses the concept found in section 1170(b). The linkage between reasonableness and justification necessarily implies that, at some point in the sentencing spectrum, an aggravated sentence imposed without any justification offered beyond the bare elements of the offense established by the jury verdict will be unreasonable. As the Eighth Circuit observed:

> [W]hen a decision is discretionary, "the court has a *range of choice*, and . . . its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." [*Kern* v. *TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)] (emphasis added). We also made it clear that the range of choice is limited. *Id.* ("when we say that a decision is discretionary . . . we do not mean that the district court may do whatever pleases it"). Similarly, reasonableness as a constraint on a district court's discretion to depart downward infers a limited range of choice.

United States v. *Haack*, 403 F.3d 997, 1004 (8th Cir. 2005) (first ellipses added); see also *United States* v. *Talley*, 431 F.3d at 788 ("In our evaluation of a sentence for reasonableness, we recognize that there is a range of reasonable sentences from which the district court may choose . . . .").

Booker's reasonableness constraint effectively creates a range of reasonable sentencing choices within the sentencing spectrum. *Booker*'s directive—that the district courts base their sentencing decisions on the policy goals set out by Congress in § 3553(a) and take into account the

Guidelines range—dictates a range of reasonable choices roughly proportionate to the Guidelines range. Applying these considerations, it would be unreasonable for a sentencing court to depart from the Guidelines and impose the statutory maximum based on the bare conviction alone. Unless sufficient justification is offered to expand the range of reasonable choices, a court's decision to impose the statutory maximum will be defective. Cf. *United States* v. *Cage*, ___ F.3d ___, 2006 WL 1554674, at *9 ("[W]e should only treat the actual sentence as being a reasonable application of § 3553(a) factors if the facts of the case are dramatic enough to justify such a divergence from the politically-derived guideline range."). Critically, however, such a sentence would not be *unauthorized*, but *unreasonable*. While the statutory maximum identified by Congress is always legally available based on the jury's verdict alone, it is not a *reasonable* sentence based on the verdict alone in the absence of sentencing factors justifying an aggravated term. To impose the statutory maximum for a run-of-the-mill offender without *any* additional justification will always be unreasonable.

3. Section 1170(b)'s reasonableness constraint is constitutionally equivalent to the reasonableness review requirement validated in *Booker*

The relevant features of California's sentencing system operate in much the same way as the reformed Guidelines system. California's system and the reformed Guidelines allow the court to find "sentencing factors" by a preponderance of the evidence. Compare Cal. R. Ct. 4.420(b) with *United States* v. *Grier*, 449 F.3d 558, 569-70 (3d Cir. 2006) (applying preponderance burden of proof for finding sentencing factors). But cf. *United States* v. *Staten*, 450 F.3d 384, 392-94 (9th Cir. 2006) (holding that, while

preponderance is the general level of proof, facts that give rise in an "extremely disproportionate" increase in sentence above the Guidelines range must be found by clear and convincing evidence). Both California courts and federal district courts must balance the applicable factors in exercising discretion and must state reasons on the record to support any aggravated sentence. Compare § 1170(b) and Cal. R. Ct. 4.420(b) with *United States* v. *Grier*, 449 F.3d at 574 ("The record must disclose meaningful consideration of the relevant statutory factors and the exercise of independent judgment, based on a weighing of those factors, in arriving at a final sentence."). Neither of these features raises constitutional concerns. *Apprendi*, *Blakely*, and *Booker* did not set out any new constitutional limitations on the burden of proof for appropriate judicial factfinding within the available base range. Cf. *United States* v. *Watts*, 519 U.S. 148, 155 (1997) (per curiam) (observing "that application of the preponderance standard at sentencing generally satisfies due process"); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986). The requirement that courts balance factors and state reasons for imposing an aggravated sentence within the applicable range provides the reviewing court with a record to evaluate whether the trial court employed the correct procedure in reaching its conclusion and if its sentencing decision was unreasonable.

The sentencing constraint imposed in section 1170(b) also operates essentially the same way as that imposed in *Booker*. California's reasonableness constraint provides that, although all three terms of the base range are legally available, imposing the statutory maximum in the absence of *any* justification would be unreasonable and an abuse of discretion. California's system, of course, differs from the reformed Guidelines system in that California's has a

single midterm, not a *range* of choices between the statutory maximum and statutory minimum covering a wide spectrum of sentencing choices. Consequently, the State's system does not give rise to a requirement that increasingly compelling reasons must be offered to justify progressively more severe sentences. Cf. *United States* v. *Dean*, 414 F.3d at 729. Under the advisory Guidelines the statutory maximum may be reasonable only when supported by *substantial* justification, but an upper term in California can be reasonable with a single aggravating factor. In California's system, the complete absence of any justification to support the statutory maximum or minimum leaves the midterm sentence as the only *reasonable* sentencing choice, and thus it has been labeled a "presumptive" term. That the midterm may be the only reasonable sentencing choice after all factors are taken into account, however, does not render the upper term legally unavailable as a sentence based on the jury verdict alone. Abuse of discretion or unreasonableness is determined at the end of the sentencing process; it is not a threshold evaluation that determines the availability of the sentencing options. Section 1170(b)'s reasonableness constraint does not render the upper term legally unavailable for *Apprendi* purposes, nor does it constitutionally preclude the trial court from conducting judicial factfinding to impose an upper term. California's system conforms to *Booker* and therefore does not violate *Blakely* and *Apprendi*.

4. Petitioner's upper term sentence is constitutional

California's determinate sentencing law satisfies the constitutional mandates of the Sixth and Fourteenth Amendments. Its crime-specific base ranges consisting of three terms place a defendant on notice of the punishment

for each offense. Petitioner himself was convicted of violating California Penal Code section 288.5, which expressly provides a base range of "6, 12, or 16 years." Because those terms were available based on the verdict alone, the upper term was the statutory maximum for Sixth Amendment purposes.

The trial court properly found facts to select the appropriate term from that offense-specific base range. It considered the probation and psychological evaluations, and the statements and arguments of the parties and witnesses. It evaluated factors in aggravation and mitigation that informed whether petitioner's crime was typical, extenuated, or worse than average. The court found, among other factors, that the crime involved threats of violence and an abuse of a position of trust. After balancing the factors and detailing the applicable sentencing objectives, the court concluded that petitioner's offense fell outside the norm for similar offenses and selected the upper term. Under section 1170(b), the ultimate base-term selection rested on the reasonableness of the sentence in light of all the pertinent circumstances. The court of appeal reviewed the trial court's decision for an abuse of discretion and, despite discounting some aggravating factors, found no abuse. The trial judge's factfinding to select a term from the legally available range was constitutional.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: July 12, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy Solicitor General

STAN HELFMAN
Supervising Deputy Attorney General

JEFFREY M. LAURENCE
Deputy Attorney General
Counsel of Record

Counsel for Respondent

APPENDIX

1. California Penal Code section 288.5(a) provides:

> Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct under Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.

2. California Penal Code section 1170(b) provides in relevant part:

> When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section

1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.

3. California Rule of Court 4.408 provides:

(a) The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.

(b) The order in which criteria are listed does not indicate their relative weight or importance.

4. California Rule of Court 4.409 provides:

Relevant criteria enumerated in these rules shall be considered by the sentencing judge, and shall be deemed to have been considered unless the record affirmatively reflects otherwise.

5. California Rule of Court 4.410 provides:

(a) General objectives of sentencing include:

(1) Protecting society.

(2) Punishing the defendant.

(3) Encouraging the defendant to lead a law abiding life in the future and deterring him or her from future offenses.

(4) Deterring others from criminal conduct by demonstrating its consequences.

(5) Preventing the defendant from committing new crimes by isolating him or her for the period of incarceration.

(6) Securing restitution for the victims of crime.

(7) Achieving uniformity in sentencing.

(b) Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge must consider which objectives are of primary importance in the particular case. The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case.

6. California Rule of Court 4.420 provides:

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of

the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

7. California Rule of Court 4.421 provides:

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

8. California Rule of Court 4.423 provides:

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.

Supreme Court, U.S.
FILED
DEC 15 2005
OFFICE OF THE CLERK

No. 05-6651

IN THE SUPREME COURT OF THE

UNITED STATES

JOHN CUNNINGHAM,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PETER GOLD*
2269 Chestnut Street, #124
San Francisco, CA 94123
(510) 872-6305
Counsel for Petitioner

*Counsel of Record

RECEIVED
DEC 30 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA'S DETERMINATE SENTENCING LAW, BY PERMITTING SENTENCING JUDGES TO IMPOSE ENHANCED SENTENCES BASED ON THEIR DETERMINATION OF FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS 1

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Blakely v. Washington, 542 U.S. 296, 125 S.Ct. 2531 (2004) 1

Lopez v. People, 113 P.3d 713 (Colo. 2005) 4

People v. Black, 35 Cal.4th 1238 (Cal. 2005) 2

People v. Lopez, ___ P.3d ___, 2005 WL 3046661 (N.M. 2005) . . . 5

Smylie v. State, 823 N.E.2d 679 (Ind. 2005) 4

State v. Brown, 209 Ariz. 200, 99 P.3d 15 (Ariz. 2004) 4

State v. Dilts, 337 Or. 645, 103 P.3d 95 (Or. 2004) 4

State v. Gomez, 163 S.W.3d 632 (Tenn. 2005) 4

State v. Hughes, 154 Wash.2d 118, 110 P.3d 192 (Wash. 2005) 4

State v. Natale, 184 N.J. 458, 878 A.2d 724, (N.J. 2005) 4

State v. Shattuck, 689 N.W.2d 785 (Minn. 2004) 4

United States v. Booker, ___ U.S. ___, 125 S.Ct. 738 (2005) 1

UNITED STATES CONSTITUTION

Sixth Amendment 1

Fourteenth Amendment 1

ARGUMENT

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA'S DETERMINATE SENTENCING LAW, BY PERMITTING SENTENCING JUDGES TO IMPOSE ENHANCED SENTENCES BASED ON THEIR DETERMINATION OF FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

Mr. Cunningham has urged the Court to grant his Petition for Writ of Certiorari for two related reasons: (1) to decide whether California's Determinate Sentencing Law (the "DSL"), by allowing judges to impose aggravated sentences based on factual determinations not made by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments, and (2) to resolve the split of authority which has developed in the state courts in the wake of *Blakely v. Washington*, 542 U.S. 296, 125 S.Ct. 2531 (2004), and *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), regarding the application of these cases to sentencing schemes just like California's DSL. In addition, Mr. Cunningham explained that his case presents an excellent vehicle for settling the constitutionality of the DSL.

The State does not dispute the importance of the question presented to thousands of criminal defendants each year. Nor does it contest that this case affords an ideal opportunity to resolve this question. Rather, the State argues that the Court should deny certiorari because the

DSL does not violate the Sixth or Fourteenth Amendment, and because there is not actually a split of authority for this Court to resolve. Opposition at 3-13. If anything, however, the State has provided a strong argument for why the Court should grant certiorari in this case.

The primary thrust of the State's opposition is that the DSL, as recently clarified by the California Supreme Court in *People v. Black*, 35 Cal.4th 1238 (Cal. 2005), does not run afoul of *Blakely's* constitutional mandate. Opposition at 3-11. To this end, the State provides a fairly extensive explanation of *Booker* and *Black*, and argues that the imposition of the upper term, not the middle term, under the DSL constitutes the statutory maximum pursuant to *Blakely*. Opposition at 3-11. It then concludes: "Petitioner's allegation that the rule of *Blakely* was misapplied is not a compelling reason to grant certiorari." Opposition at 12. Implicit in this argument is that the Court should deny certiorari simply because the State does not believe the DSL offends the Constitution. Indeed, the Opposition in this regard is really nothing more than an argument on the merits of the issue, as contrasted with an explanation for why the issue presented is unworthy of certiorari. Yet, by highlighting the diametrically opposed views on this issue -- which division is also illustrated by the dissents in this case and in *Black*, and in the competing opinions of numerous other jurisdictions passing on the

validity of their determinate sentencing laws under *Blakely* -- the State has unwittingly presented a powerful rationale for why certiorari is appropriate.

As for the necessity of certiorari to resolve the split of authority in the state courts, the State denies that any split exists on the theory that the decisions cited do not conflict in their understanding and interpretation of *Blakely* and *Booker*:

> "Far from reflecting a divergence in the interpretation of *Blakely*, the decisions cited by petitioner merely analyze how *Blakely* and *Booker* apply to particular sentence systems. The sentencing systems of the cited states vary -- sometimes quite widely -- in their structure, language, and application. Even where different states appear to have facially similar sentencing systems, those systems can differ significantly in operation after the state courts construe the relevant statutes and rules applying to a particular case." Opposition at 12-13.

The State's position that no constitutionally significant division exists in the state courts need not distract this Court for long. Glaringly absent from the State's Opposition are any specifics as to how the determinate sentencing laws of the jurisdictions in question meaningfully vary from California's for purposes of a *Blakely* analysis. This is undoubtedly because they do not.

As relevant here, the common denominator of the sentencing schemes cited -- as with Washington state's sentencing scheme analyzed

in *Blakely* -- is that a judge is permitted to make factual findings in imposing a sentence longer than the maximum authorized by the jury's verdicts or the defendant's admissions. *See, e.g. State v. Natale*, 184 N.J. 458, 473, n.4, 878 A.2d 724 (N.J. 2005) [cataloguing various sentencing schemes which place a ceiling on sentences that can be imposed based on jury verdicts alone, but which allow for judicial factfinding to increase sentences up to maximum allowed by statute].) In *Natale*, the New Jersey Supreme Court has recently characterized the split that has emerged among the state courts as follows:

> "Courts in states with sentencing schemes similar to our own have reached varying conclusions regarding the impact of *Blakely, supra,* and *Booker, supra,* on presumptive sentencing. Some have held that when the jury verdict or guilty plea authorizes only a presumptive term, an increase in the sentence above the presumptive based on judicial findings violates the Sixth Amendment. [Citing *Smylie v. State*, 823 N.E.2d 679, 683 (Ind. 2005); *State v. Brown*, 209 Ariz. 200, 99 P.3d 15, 17-18 (Ariz. 2004); *State v. Shattuck*, 689 N.W.2d 785, 786 (Minn. 2004); *State v. Dilts*, 337 Or. 645, 103 P.3d 95, 98-100 (Or. 2004)]. Others, including the Supreme Court of California, have concluded that there is no Sixth Amendment impediment when a judge increases a sentence above the presumptive term, but within the statutory range, based on discretionary judicial findings. [Citing *People v. Black, supra,* 35 Cal.4th at 544; *Lopez v. People,* 113 P.3d 713, 730-731 (Colo. 2005); *State v. Gomez,* 163 S.W.3d 632, 658 (Tenn. 2005); *State v. Hughes*, 154 Wash.2d 118, 110

P.3d 192, 200 and n.3 (Wash. 2005)]." *State v. Natale, supra,* 184 N.J. at p. 482-483.)[1]

In fact, state high courts have even divided on whether to adopt or reject California's interpretation of *Blakely* and *Booker* as applied to a judge's factfinding discretion in imposing aggravated sentences. *See, e.g., State v. Natale, supra,* 184 N.J. at p. 466 [rejecting *Black's* interpretation]; *People v. Lopez, supra,* 2005 WL 3046661 at p. 9, 11-15 [adopting *Black's* interpretation]. Thus, the State's theory that no split exists among the state courts as to their interpretation of *Blakely* and *Booker* is fallacious, and therefore is no obstacle to this Court granting certiorari in this case.

---

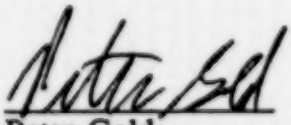
[1] Since the filing of Mr. Cunningham's petition, the Supreme Court of New Mexico has weighed in on the side of the California Supreme Court in *Black*, concluding that New Mexico's sentencing scheme does not violate the Sixth Amendment, but rather "illustrates an appropriate reliance on judicial discretion to sentence following a jury verdict, bench trial, or guilty plea." *People v. Lopez*, ___ P.3d ___, 2005 WL 3046661 at p. 15 (N.M. 2005) (decided Oct. 14, 2005).

CONCLUSION

The question presented here is one of great public importance which will not be resolved without intervention by this Court. In light of the untold number of criminal defendants whose constitutional rights are violated every day during sentencing and the stark split of authority which has developed in the state courts, delay offers no substantial advantages, but entails large costs. Since this case presents an ideal vehicle for addressing this matter, the Court should grant the Petition for Writ of Certiorari.

DATED: December 15, 2005.

Respectfully submitted,

By: 
Peter Gold
Attorney for Petitioner
John Cunningham

CERTIFICATE OF SERVICE

I, Peter Gold, am over 18 years of age. My business address is 2269 Chestnut Street, #124, San Francisco, California, 94123. I am not a party to this action.

On December 15, 2005, I served the within

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

upon the parties named below by depositing a true copy in a United States mailbox in Libertyville, Illinois, in a sealed envelope, postage prepaid, and addressed as follows:

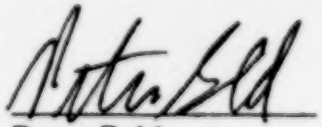
Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

First District Appellate Project
730 Harrison Street, Suite 201
San Francisco, CA 94107

Clerk of the Court
Court of Appeal
First District, Division Five
350 McAllister Street
San Francisco, CA 94102

John Cunningham
(retained for appellant)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 15, 2005.



Peter Gold

FILED
JUL 12 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-6551

In The
Supreme Court of the United States

JOHN CUNNINGHAM,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of California, First Appellate District

BRIEF OF HAWAII, ARKANSAS, COLORADO, ILLINOIS, MONTANA, NEVADA, OREGON, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENT

MARK J. BENNETT
Attorney General of Hawaii
DOROTHY D. SELLERS
KIMBERLY A. TSUMOTO*
Deputy Attorneys General
**Counsel of Record*
Department of the
Attorney General
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Amicus Curiae State of Hawaii

Of Counsel:
DAN SCHWEITZER
750 First Street, N.E.,
Suite 1100
Washington, D.C. 20002
(202) 326-6010

(Additional Counsel For Amici Curiae Are Listed Inside The Front Cover.)

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

MIKE BEEBE
Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, Arkansas 72201-2610

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street, Fifth Floor
Denver, Colorado 80203

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
Chicago, Illinois 60601

MIKE MCGRATH
Attorney General of Montana
Justice Building
P.O. Box 201401
Helena, Montana 59620-1401

GEORGE J. CHANOS
Attorney General of Nevada
Nevada Department of Justice
100 North Carson Street
Carson City, Nevada 89701

HARDY MYERS
Attorney General of Oregon
1162 Court Street, N.E.
Salem, Oregon 97301

GREG ABBOTT
Attorney General of Texas
Capitol Station
P.O. Box 12548
Austin, Texas 78711-2548

MARK L. SHURTLEFF
Attorney General of Utah
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, Utah 84114-2320

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	8
The California Sentencing System, Like The Federal Sentencing System After *United States v. Booker*, Allows Judges To Impose The Maximum Statutory Sentence In The Exercise Of Their Reasoned Discretion, And Therefore Does Not Violate The Sixth Amendment	8
I. *Booker* held that the Constitution permits judges to base sentences on facts they find if the judges are reasonably exercising their discretion, guided by statutorily-specified considerations	10
A. *Booker* changed the federal sentencing system from a determinate system to a quasi-indeterminate system	10
B. The quasi-indeterminate sentencing system established in *Booker* comports with *Blakely*	14
II. In all relevant respects, the California sentencing system operates in the same manner as the post-*Booker* federal sentencing system	16
A. The California sentencing system, like the post-*Booker* federal sentencing system, is quasi-indeterminate	17

TABLE OF CONTENTS – Continued

Page

B. The California sentencing system – like the post-*Booker* federal sentencing system – comports with *Blakely* 21

III. A ruling that California's sentencing system violates the Sixth Amendment would have serious consequences for the states 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Apprendi v. New Jersey, 530 U.S. 466 (2000)...5, 10, 17, 21, 26

Blakely v. Washington, 542 U.S. 296 (2004).....*passim*

Dorszynski v. United States, 418 U.S. 424 (1974)..... 11

Ewing v. California, 538 U.S. 11 (2003) 25

Harris v. United States, 536 U.S. 545 (2002)..... 10, 14

In re Jeanice D., 617 P.2d 1087 (Cal. 1980) 1, 2

People v. Black, 113 P.3d 534 (Cal. 2005).....*passim*

People v. Hernandez, 757 P.2d 1013 (Cal. 1988)..... 18, 23

Ring v. Arizona, 536 U.S. 584 (2002)..... 29

State v. Foster, 845 N.E.2d 470 (Ohio 2006)..... 28

State v. Natale, 878 A.2d 724 (N.J. 2005) 28

United States v. Booker, 543 U.S. 220 (2005) .....*passim*

United States v. Dean, 414 F.3d 725 (7th Cir. 2005)..... 21

United States v. Lopez, 514 U.S. 549 (1995)..... 28

United States v. Mares, 402 F.3d 511 (5th Cir. 2005)... 13, 20

United States v. Moreland, 437 F.3d 424 (4th Cir. 2006) 12

Williams v. New York, 337 U.S. 241 (1949).....10, 11, 13, 16

CONSTITUTION:

United States Constitution, Sixth Amendment .. 9, 15, 22, 23

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND SESSION LAWS:

18 U.S.C. §2423 15

18 U.S.C. §3553 ..... 6, 11, 12, 19

18 U.S.C. §3742 12

Alaska Stat. §12.55.155 26

Ariz. Rev. Stat. §13-702.02 26

Cal. Penal Code §288.5 4

Cal. Penal Code §1170 ..... 2, 3, 7, 19

Ind. Code § 35-50-2-1.3 27

Kan. Stat. Ann. §21-4716 26

Minn. Stat. §244.10 26

N.C. Gen. Stat. §15A-1340.10 26

Tenn. Code Ann. §40-35-210 28

Wash. Rev. Code §9.94A.120 24

Wash. Rev. Code §9.94A.310, et seq. 24

Wash. Rev. Code §9.94A.537 26

Act of June 29, 2005, 2005 Oregon Laws 463 26

RULES AND REGULATIONS:

Cal. Rules of Court 4.408 ..... 3, 17

Cal. Rules of Court 4.420 ..... 3, 20, 21

Cal. Rules of Court 4.421 3

Cal. Rules of Court 4.423 3

United States Sentencing Guideline §5K2.0 20

TABLE OF AUTHORITIES – Continued

Page

United States Sentencing Guideline §5K2.3 15

United States Sentencing Guideline §5K2.8 15

United States Sentencing Guideline §5K2.18 15

OTHER AUTHORITIES:

Douglas A. Berman, *Conceptualizing Booker*, 38 Ariz. St. L. J. ___ (2006) 16

Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463 (2004) 9

Frank Bowman, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with Blakely v. Washington*, 16 Fed. Sent. R. 364 (2004) 28

Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 Emory L. Rev. 377 (2005) 9

Kim S. Hunt and Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 Fed. Sent'g Rep. 233 (2005) 27

Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law At Cross-Purposes*, 105 Colum. L. Rev. 1082 (2005) 12, 27

United States Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* (March 2006) 13, 19

Washington State Sentencing Guidelines Comm'n, *Statistical Summary of Adult Felony Sentencing, Fiscal Year 2004* 25

INTEREST OF AMICI CURIAE

Few issues are more important to State governments than the proper functioning of their criminal justice systems. A fundamental component of criminal justice is, of course, the punishments imposed on convicted offenders. As can be expected in our federal system, the States have adopted varying approaches to sentencing, some utilizing formal guidelines similar to the Federal Sentencing Guidelines, others retaining traditional discretionary regimes, still others adopting hybrid systems. The amici States are representative of this diversity, and none has a sentencing system identical to California's. Nevertheless, the amici join together in filing this brief in support of California based on their shared interest in ensuring that the limits imposed by *United States v. Booker*, 543 U.S. 220, 225-44 (2005) (opinion in part for the Court by Justice Stevens), and *Blakely v. Washington*, 542 U.S. 296 (2004), are not unduly expanded. Even after *Booker* and *Blakely*, States can provide some structure to help ensure that their judges exercise reasonable discretion in imposing sentences. California has done precisely that, and its sentencing statute should be upheld by this Court.

STATEMENT OF THE CASE

1. Prior to 1977, most California offenders were sentenced to an indeterminate term, typically one year to life. "A sentence to an indeterminate term was in effect, deemed a sentence for the maximum statutory term, subject to parole by the Adult Authority . . . , which agency was constitutionally compelled to fix a term within the statutory range that was proportionate to the offense." *In re Jeanice D.*, 617 P.2d 1087, 1094 (Cal. 1980). In 1977, the

California Legislature enacted its Determinate Sentencing Law, which "repealed the provisions governing the fixing of terms by the Adult Authority . . . , substituting 'determinate terms' for substantially all offenses which formerly had carried indeterminate terms and which had not been reduced to misdemeanors." *Id.* The new sentencing system sought to ensure punishment "proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." Cal. Penal Code §1170(a)(1). The Legislature further determined that those objectives "can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offenses . . . to be imposed by the court with specified discretion." *Id.*

For most offenses, the statute specifies three terms of imprisonment, labeled the lower, middle, and upper terms. The statute contemplates two basic ways by which an offender can receive a sentence other than the middle term. First, the sentence could be *enhanced*

> on the basis of statutory enhancements reflecting the defendant's criminal history or particular circumstances of the crime, including, for example, the use of a firearm or other dangerous weapon, infliction of great bodily injury on the victim, the particular vulnerability of the victim . . . , commission of the crime while released pending trial, the amount of property loss, and the quantity of drugs involved.

People v. Black, 113 P.3d 534, 537 (Cal. 2005) (*citing* Cal. Penal Code §§667.5, 667.9, 667.10, 12022.1, 12022.5-.55, 12022.6, 12022.7, 12022.8, 12022.75, 12022.9; Cal. Health & Safety Code §11370.4). These enhancements must be set forth in the indictment and proved to the jury beyond a

reasonable doubt unless the defendant waives that right. Cal. Penal Code §1170(e).

Second, the judge can impose the upper or lower terms (plus any enhancement) if the judge finds that aggravating circumstances outweigh the mitigating circumstances or vice versa. *Id.* §1170(b); Cal. Rules of Court, Rule ("Cal. Rule") 4.420(b). The California rules provide that "[c]ircumstances in aggravation include" a list of eleven "[f]acts relating to the crime" (such as the defendant's role in the crime and the manner in which it was carried out) and a list of five "[f]acts relating to the defendant" (such as the defendant's criminal record and past performance on probation or parole). Cal. Rule 4.421. In addition, Rule 4.408(a) authorizes judges to consider any "additional criteria reasonably related to the decision being made." The only limits on what circumstances can count as aggravating for these purposes are that, in imposing the upper term, the judge may not rely on a fact that is an element of the crime, or a fact that is serving to enhance the crime unless the court strikes the enhancement. Cal. Rule 4.420(c), (d).

The mitigating factors the judge may consider are equally broad, covering a similar list of "[f]acts relating to the crime" and "[f]acts relating to the defendant," as well as "additional criteria reasonably related to the decision being made." Cal. Rule 4.423, 4.408. A judge who selects an upper or lower term must state his reasons "orally on the record" and provide "a concise statement of the" aggravating and mitigating factors he found. Cal. Rule 4.420(e).

2. Petitioner was convicted by a jury of the continuous sexual abuse of a child in violation of California Penal

Code §288.5. Pursuant to the statute, this crime "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." *Id.* The trial court sentenced Petitioner to the upper 16-year term, explaining that (1) the crime involved great violence and the threat of great bodily harm; (2) the victim was particularly vulnerable due to his age and dependence on Petitioner as his father and primary caretaker; (3) Petitioner threatened to commit bodily injury in an attempt to coerce the victim to recant his statements about the crime; (4) Petitioner took advantage of a position of trust to commit the crime; (5) Petitioner is a serious danger to the community; and (6) Petitioner was a peace officer at the time he committed the criminal acts, violating his duty to serve the community. J.A. 22-23. The California Court of Appeal affirmed the sentence, rejecting Petitioner's contention that it was imposed in violation of *Blakely*. Pet. App. A 16-17.

3. Two months after the Court of Appeal's decision in this case, the California Supreme Court decided *People v. Black*, *supra*, which definitively construed the State's sentencing provisions and upheld them against a *Blakely* challenge. The court reasoned that "in operation and effect, the provisions of the California determinate sentencing law simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." 113 P.3d at 543.

In support of that conclusion, the court stated that "the requirement that an aggravating factor exist" before an upper term may be imposed "is merely a requirement that the decision to impose the upper term be *reasonable*." *Id.* at 544 (emphasis in original). As such, it is akin to a

traditional discretionary sentencing system: the "Legislature did not identify all of the particular facts that could justify the upper term. Instead, it afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence." *Id.*

The California Supreme Court found that this feature of the California sentencing system makes it akin to the federal system after *Booker*. "*Booker* makes clear that the concept of a discretionary sentencing system is not limited to those decisions that involve complete, unguided, and unreviewable discretion. . . . After *Booker*, a federal judge, while not bound to apply the guidelines, must consult those guidelines and take them into account when sentencing." *Black*, 113 P.3d at 547. The court concluded that "the [California] determinate sentencing law's requirement that an upper term sentence be imposed only if an aggravating factor exists is comparable to *Booker*'s requirement that a federal judge's sentencing decision be not unreasonable." *Id.* at 548.

SUMMARY OF ARGUMENT

The line of decisions beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not bar all judicial factfinding that might have the effect of increasing the sentence a defendant receives. The Court has drawn a sharp dichotomy between judicial factfinding undertaken in indeterminate sentencing systems and judicial factfinding undertaken in determinate systems. The former is permitted, even where the judge imposes a sentence at or near the statutory maximum based on facts only he found.

The central issue in this case is whether California's sentencing regime, as construed by the California Supreme Court, is properly characterized as determinate or indeterminate. A comparison of the California system with the federal system as modified in *Booker* confirms that it is best characterized as indeterminate.

1. The remedial opinion in *Booker* did not give federal district courts untethered discretion to impose sentences anywhere within the statutory range. To the contrary, the Court required district courts to consult the Guidelines and to consider factors set forth in 18 U.S.C. §3553(a) when exercising their sentencing discretion. The Court also subjected district court sentencing decisions to appellate review for "reasonableness" based on the §3553(a) factors. The post-*Booker* sentencing system is, therefore, a hybrid, neither binding district courts to mandatory guidelines nor granting them the untethered discretion they had prior to the Federal Sentencing Act.

Notwithstanding the constraints still imposed on district courts, no Justice in *Booker* suggested that the modified federal sentencing system is unconstitutional. Put another way, no Justice disputed that, notwithstanding those constraints, the modified federal sentencing system is an indeterminate system. A defendant who commits a federal crime does not have a legal *right* to a sentence within the Guidelines range and is not *entitled* to a sentence below the statutory maximum merely because the jury did not find facts that might form the basis of an upward departure. At bottom, the post-*Booker* federal sentencing system allows district courts to exercise reasoned judgment, which is precisely the task of judges in any indeterminate system.

2. The California sentencing system likewise authorizes judges to exercise broad discretion, constrained by a reasonableness requirement. It is true that the California statute authorizes a judge to impose an upper term only if the judge finds facts that convince him that aggravating circumstances outweigh the mitigating circumstances. Cal. Penal Code §1170(b). But the California Supreme Court construed that provision as "merely a requirement that the decision to impose the upper term be *reasonable*," *Black*, 113 P.3d at 544. By contrast, the Washington Supreme Court never construed the Washington statute at issue in *Blakely* in that manner. By reading the California sentencing law as it did, the California Supreme Court read the statute as creating an indeterminate system under which judges exercise "the traditional broad range of discretion." *Id.*

It matters not that a California judge's discretion is cabined by a reasonableness requirement, that imposition of the middle term will typically be considered reasonable, or that a judge's reasons for sentencing a defendant at the top of the sentencing range must be stated on the record. Precisely the same is true in the post-*Booker* federal system. Accordingly, as in the federal system, a defendant who commits a California crime does not have a legal *right* to a middle-term sentence and is not *entitled* to a sentence below the upper term merely because the jury did not find facts that might form the basis of an upward departure. The broad discretion the California system vests in sentencing judges forecloses that result. Like the post-*Booker* federal system, the California sentencing systems directs sentencing judges to exercise reasoned judgment in selecting, within the full statutory range, the appropriate sentence. Both systems are indeterminate.

3. Petitioner and his amici assert that ruling against California would be inconsequential because California – and, presumably, other States – can easily "*Blakely*-ize" or "*Booker*-ize" their systems. Neither suggestion has merit. Although a *Blakely*, jury-factfinding system has advantages that commend itself to many States, the approach also has the drawbacks noted in the *Blakely* dissents. In the end, the policy decision whether to *Blakely*-ize a sentencing system involves complex tradeoffs, the outcome of which will vary from State to State. Our federal system is premised on the recognition that different States, reflecting the wills and interests of their different constituencies, will choose different policies. It is not for amicus NACDL to decide that every State must *Blakely*-ize its system. Nor is it necessary, as petitioner suggests, for the California Legislature to *Booker*-ize the California sentencing system. As construed by the California Supreme Court, the California system operates in essentially the same way as *Booker*-ized systems. There is no need for a legislative fix.

ARGUMENT

The California Sentencing System, Like The Federal Sentencing System After *United States v. Booker*, Allows Judges To Impose The Maximum Statutory Sentence In The Exercise Of Their Reasoned Discretion, And Therefore Does Not Violate The Sixth Amendment.

Although the California sentencing system does not give sentencing judges untethered discretion to impose sentences anywhere between the statutory minimums and maximums, neither does the post-*Booker* federal system.

Both systems impose certain substantive and procedural constraints on sentencing judges' power to sentence at or near the upper range. Yet, more importantly, both empower sentencing judges to exercise their reasoned discretion in determining where, within the full statutory range, defendants should be sentenced. Judicial discretion of that sort is the hallmark of indeterminate sentencing schemes and is the reason the California sentencing system, like the federal system, comports with *Blakely* and satisfies the Sixth Amendment.[1]

---

[1] Traditionally, the term "indeterminate" referred to systems that use discretionary parole release; the term "determinate" referred to systems that do not. Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 Emory L. Rev. 377, 382-83 (2005). As Professor Bibas has observed, however, "[i]n more modern parlance, indeterminate sentencing allows judges to set sentences anywhere below the statutory maxima (for example, anywhere from zero to twenty years for armed robbery). Determinate sentencing, in contrast, uses sentencing guidelines or statutes (such as mandatory minima) to guide or constrain judicial discretion within the statutory ranges." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2468 n.12 (2004). This explains why it is perfectly reasonable to construe a system titled "Determinate Sentencing Law" as indeterminate. In 1977, California switched its system from "indeterminate" to "determinate," as those terms were traditionally understood, *i.e.*, California no longer authorized a parole board to determine the release date. Those traditional terms do not speak to whether the system is determinate or indeterminate in "modern parlance." See Chanenson, *supra*, at 384 (explaining that a "determinate" system, as the term was traditionally understood, "may be discretionary or nondiscretionary. A discretionary, determinate system allows a judge to pick the actual sentence . . . from a statutory range of punishments.").

I. *Booker* held that the Constitution permits judges to base sentences on facts they find if the judges are reasonably exercising their discretion, guided by statutorily-specified considerations.

A. *Booker* changed the federal sentencing system from a determinate system to a quasi-indeterminate system.

The parties in this case have exhaustively rehearsed this Court's opinions in *Apprendi*, *Blakely*, and *Booker*, and we will not do so again. For present purposes, a few aspects of those decisions bear highlighting.

Starting with *Apprendi* and continuing through *Booker*, this Court has reaffirmed that *Williams v. New York*, 337 U.S. 241, 246 (1949), remains good law, and that judges operating in indeterminate sentencing systems may exercise their discretion by imposing the statutory maximum sentence based on facts found solely by them. See *Apprendi*, 530 U.S. at 481; *Harris v. United States*, 536 U.S. 545, 558 (2002); *Blakely*, 542 U.S. at 308-09; *Booker*, 543 U.S. at 233. In *Williams*, the Court expressly approved the practice of judges basing their sentences on facts not put before the jury, including "[o]ut-of-court affidavits," judges' personal "knowledge of the personalities and backgrounds of convicted offenders," and "information concerning every aspect of a defendant's life" set forth in probation reports. 337 U.S. at 246, 250. The Court found that this information was not presented at trial for "sound practical reasons," *id.* at 246, and that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information was restricted to that given in open court by witnesses subject to cross examination." *Id.* at 250.

In *Booker*, the Court addressed the interplay between *Williams*' approval of judicial factfinding, *Blakely*, and the Federal Sentencing Guidelines:

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. See *Apprendi*, 530 U.S., at 481; *Williams* v. *New York*, 337 U.S. 241, 246 (1949). Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges; . . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

543 U.S. at 233 (opinion in part for the Court by Justice Stevens). The remedial majority, of course, took up that suggestion and severed 18 U.S.C. §3553(b)(1) from the Sentencing Reform Act, thereby making the Guidelines advisory. *Id.* at 244-71 (opinion in part for the Court by Justice Breyer).

Critically, the remedial opinion in *Booker* did not revert federal sentencing to its pre-Sentencing Guidelines state. Prior to the Guidelines, federal district court judges exercised virtually unreviewable discretion when meting out sentences. See *Dorszynski v. United States*, 418 U.S. 424, 443 (1974) ("Well-established doctrine bars [appellate] review of the exercise of sentencing discretion."), quoted in *Booker*, 543 U.S. at 307 (Scalia, J., dissenting in part). Adopting that approach, however, would have undermined Congress' desire to "provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding

unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted." 543 U.S. at 264 (quoting 28 U.S.C. §991(b)(1)(B)). The Court therefore required district courts to "consult the Guidelines" and to consider the factors set forth in 18 U.S.C. §3553(a) when exercising their sentencing discretion. 543 U.S. at 264.

In addition, the Court severed the "appeals-related section" of the Sentencing Reform Act, 18 U.S.C. §3742(e), and held that appellate courts will instead review federal sentences for "reasonableness," based on the considerations set forth in §3553(a). 543 U.S. at 260-62. Such review is a "complex and nuanced [task], . . . requiring [the court] to consider the extent to which the sentence imposed by the district court comports with the various, and sometimes competing, goals of [the federal guidelines]." *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006). This is a far cry from pre-Guidelines practice under which, as noted, appellate review of the trial judges' exercise of sentencing discretion was barred.[2]

The post-*Booker* federal system also differs from pre-Guidelines practice in requiring sentencing judges to state on the record the reasons for the sentences they impose,

---

[2] See Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law At Cross-Purposes*, 105 Colum. L. Rev. 1082, 1114 n.120 (2005) ("Justice Breyer's remedial opinion in *Booker* envisions a unique model of advisory guidelines, which will coexist with some form of appellate sentence review. No state system has ever conjoined meaningful sentence review with voluntary guidelines, so the Court's experiment takes the federal system into uncharted waters."). This article was published several months before the California Supreme Court issued its opinion in *Black*.

particularly sentences that vary from the standard Guidelines range. As the Fifth Circuit has stated:

> when the judge elects to give a non-Guideline sentence, she should carefully articulate the reasons she concludes that the sentence she has selected is appropriate for that defendant. These reasons should be fact specific and include, for example, aggravating or mitigating circumstances relating to personal characteristics of the defendant, his offense conduct, his criminal history, relevant conduct or other facts specific to the case at hand which led the court to conclude that the sentence imposed was fair and reasonable.

United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) (footnote omitted). "Such reasons are essential to permit [the appeals] court to review the sentence for reasonableness as directed by *Booker*." *Id.*

The post-*Booker* federal sentencing system is therefore a hybrid. Although district courts are not bound by mandatory guidelines, neither do they have the sort of untethered discretion this Court blessed in *Williams*. This can be seen in appellate decisions since *Booker*. In contrast to the pre-Guidelines regime, appellate courts have not hesitated to reverse sentences found to be unreasonable, typically when district courts imposed sentences below or above the Guidelines range. See United States Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* (March 2006) ("*Final Report*"), at 30 (listing seventeen such decisions, as well as four decisions reversing sentences and remanding for further explanation). For these reasons, the post-*Booker*

federal sentencing system might best be described as quasi-indeterminate.

B. The quasi-indeterminate sentencing system established in *Booker* comports with *Blakely*.

Although the Court was deeply divided as to whether the *Booker* remedy faithfully effectuated Congress's intent, there was no dispute that the modified federal sentencing system is constitutional. The passage from Justice Stevens' opinion for the Court quoted earlier explains why that is so: "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Booker*, 543 U.S. at 233; see also *Harris*, 536 U.S. at 549 ("After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed.") Yet, as just explained, the post-*Booker* federal sentencing system is not a true indeterminate regime. *Booker* therefore stands for the proposition that judicial fact-finding is not only permissible in purely indeterminate schemes, it is also permissible in hybrid schemes under which judges exercise guided discretion subject to review for reasonableness.

Because that holding has major implications for this case, it merits further elaboration. Why are judges permitted to find facts in indeterminate sentencing systems, but not in mandatory guideline systems? In *Blakely*, the Court tackled this issue head on:

> Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board)

> may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence – and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

542 U.S. at 309. To truly understand why the post-*Booker* federal system satisfies *Blakely*, one needs to apply the above analysis to it.

Let's assume the following facts. A defendant is convicted under 18 U.S.C. §2423(b) of traveling in interstate commerce to engage in a sexual act with a juvenile. Although the statutory maximum for the offense is 30 years (360 months) imprisonment, the advisory Guidelines range (after all adjustments are made) is 100 to 120 months. The federal district court then sentences the defendant to 200 months imprisonment based on the court's (not the jury's) findings that (1) the victim suffered severe psychological injuries, (2) the defendant inflicted gratuitous injury, and (3) the defendant was a member of a violent street gang. See United States Sentencing Guideline §§5K2.3, 5K2.8, 5K2.18.

Although it is possible to argue that (to quote *Blakely*) the defendant had the legal *right* to the lesser sentence of 100 to 120 months, *Booker* implicitly – but undeniably –

rejects that view. The defendant in our example is not *entitled* to a maximum sentence of 120 months merely because the jury did not find the facts that formed the basis for the judge's upward departure. As in a pure indeterminate scheme, the defendant is understood as knowing that he is risking a sentence of 200 (or 360) months in jail for the offense. Although he might have received a lesser sentence had he inflicted less injury, this does not give the sexual predator who inflicts less injury an entitlement to the lesser sentence. The system vests enough discretion in the sentencing judge to foreclose that result.

As Professor Berman has explained, after *Booker*, "finding facts that have a fixed and predictable sentencing consequence is always a task for juries; considering facts in service to the exercise of reasoned judgment at sentencing is a task that can still be done by judges." Douglas A. Berman, *Conceptualizing Booker*, 38 Ariz. St. L. J. ___ (2006) (forthcoming). Although district court judges still operate under some constraints, they are best understood as exercising "reasoned judgment," just as the less-constrained judges at the time of *Williams* were.

II. In all relevant respects, the California sentencing system operates in the same manner as the post-*Booker* federal sentencing system.

The California sentencing law is not an intricate guidelines scheme, with base offense levels, "specific offense characteristics" leading to offense-level "adjustments," further adjustments based on cooperation and prior criminal history, and then the assessment of whether an upward or downward departure is warranted. Nevertheless, the key attributes of the post-*Booker* federal

sentencing system are present in the California system. Both can best be described as quasi-indeterminate schemes under which judges exercise broad discretion that is nonetheless restrained by a reasonableness requirement. Just as the post-*Booker* federal sentencing system is constitutional, so too is the California system.

A. The California sentencing system, like the post-*Booker* federal sentencing system, is quasi-indeterminate.

Petitioner's core argument is that in California the "'statutory maximum' for *Blakely* and *Apprendi* purposes" is the middle term because that "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury's verdict or admitted by the defendant." Pet. Br. 18. That analysis fails to give appropriate weight to the California Supreme Court's construction of the statute. Although California law denotes the middle term as the presumptive sentence, that designation is not a barrier to the sentencing judge's imposition of whatever he reasonably concludes is a just sentence. "[T]he requirement that an aggravating factor exist" in order to sentence a defendant to the upper term "is merely a requirement that the decision to impose the upper term be *reasonable*." *Black*, 113 P.3d at 544 (emphasis in original). The judge may impose the upper term based on any "criteria reasonably related to the decision being made'" (apart from any fact that is an element of the crime). *Id.* at 538 (quoting Cal. Rule 4.408(a)). For these reasons, the California Supreme Court described California judges as exercising "the traditional broad range of judicial discretion." *Id.* at 544.

Nor is this construction of the statute a recent, post-*Blakely*, innovation. The California Supreme Court has long construed the State's sentencing system as, essentially, indeterminate. In *People v. Hernandez*, 757 P.2d 1013, 1019 (Cal. 1988), the court stated that "aggravating and mitigating circumstances assist a judge in selecting from among the options of punishment the trier of fact's verdict has made available. They help the sentencing court select, for example, the higher, middle, or lower term." The California Supreme Court therefore concluded that "[s]uch factors are largely the articulation of considerations sentencing judges have always used in making those decisions." *Id.*

This system is far removed from the genuinely determinate sentencing systems before the Court in *Blakely* and *Booker*, in which "facts selected by legislatures . . . not only authorized, or even mandated, heavier sentences than would otherwise have been imposed, but increased the range of sentences possible for the underlying crime." *Booker*, 543 U.S. at 236. As construed by the California Supreme Court, the California system does not specify judge-found facts that increase the sentencing range; it instead gives judges wide-ranging discretion to impose sentences they believe are reasonable in light of the policies underlying the statute.

To be sure, facets of the California system differ from the traditional indeterminate system addressed in *Williams*. As we have seen, however, the same is true in the post-*Booker* federal system. In particular, the following "non-traditional" attributes are common to both systems:

In both systems, the trial judge's sentencing discretion is cabined by the requirement that sentences be "reasonable," as measured by the statutory policies. As discussed above, both the post-*Booker* federal system and the California system require that sentencing judges exercise their discretion in a "reasonable" manner, in light of policies set forth in the respective statutes. Even the policies themselves are similar in nature. The §3553(a) factors that guide the federal reasonableness determination refer not only to the prescribed offense levels, but also more generally to "the need for the sentence imposed . . . to promote respect for the law, and to provide just punishment for the offense; . . . to afford adequate deterrence to criminal conduct; [and] . . . to protect the public. . . ." Similarly, California's sentencing law seeks to promote punishment, proportionality, and uniformity. See Cal. Penal Code §1170(a)(1).

In both systems, imposition of the middle term will typically be considered reasonable. Following *Booker*, six courts of appeal "have held that a sentence within the applicable guideline range is presumptively reasonable." *Final Report*, at 26. Moreover, as of March 2006, only one within-range sentence had been reversed as unreasonable, compared to seventeen reversals of sentences outside the applicable range. *Id.* at 31. A *de facto* presumption of reasonableness apparently exists in *every* circuit. Although there does not appear to be post-*Black* appellate case law in California on this issue, it seems likely that the same result will obtain there. Thus, in both California and the federal systems, imposition of the middle term/range is the safest course for sentencing judges, but they may exceed that term/range if they do so in the exercise of reasoned discretion.

In both systems, the trial judge's reasons for sentencing a defendant at the top of the statutory range must be stated on the record. We noted earlier that the federal courts of appeal have required district courts to state their reasons for imposing above-range sentences, in order "to permit [the appeals] court to review the sentence for reasonableness as directed by *Booker*." *Mares*, 402 F.3d at 519. California judges, too, must state orally on the record their "reasons for selecting the upper or lower term," including the specific aggravating and mitigating facts. Cal. Rule 4.420(e). As in the federal system, this placement of reasons on the records enables appellate courts to review upward (or downward) departures for "reasonableness." See *Black*, 113 P.3d at 548.

In the end, notwithstanding the constraints placed on sentencing judges in the California and post-*Booker* federal systems, both systems are properly characterized as indeterminate. The critical common denominator is that both systems empower judges to sentence offenders anywhere in the statutory range based on the judges' discretionary judgment. To be sure, the Washington judge in *Blakely* and federal judges pre-*Booker* could exercise *some* discretion in deciding whether to depart upward. See *Blakely*, 542 U.S. at 305 n.8; United States Sentencing Guideline §5K2.0 ("The sentencing court *may* depart from the applicable guideline range if. . . .") (emphasis added). But their discretion only came into play after they engaged in trial-like factfinding "at the expense of the jury's traditional function of finding the facts essential to the lawful imposition of the penalty." *Blakely*, 542 U.S. at 309. The factfinding conducted by judges in California and the post-*Booker* federal system is of an entirely different nature, namely, to assist them in exercising their overarching

discretion to impose a reasonable sentence in light of the statutory goals.

It is immaterial that the California system, unlike the federal system, bars judges from considering facts that are elements of the crime (and hence already found by the jury) in deciding whether to impose the upper term. See Cal. Rule 4.420(c). The relevant issue is not what facts are taken *off* the table; the problem that prompted the *Apprendi* line of case was legislatures putting specific facts *on* the table and empowering judges to find them. Moreover, it is difficult to imagine a situation in which a federal court of appeals will hold that it was reasonable for a district court to depart upward based solely on facts that constituted elements of the crime. Judge Posner has observed that "the farther the judge's sentence departs from the guidelines sentence (in either direction – that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer." *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005). A jury's mere finding that the defendant committed the elements of the crime will rarely amount to a "compelling . . . justification" for an upward departure. Thus, in both systems the statutory maximum sentence will be imposed only (or virtually only) based on facts found by the sentencing court.

B. The California sentencing system – like the post-*Booker* federal sentencing system – comports with *Blakely*.

Because judicial factfinding in indeterminate sentencing systems does not occur "at the expense of the jury's traditional function of finding the facts essential to the lawful imposition of the penalty," *Blakely*, 542 U.S. at 309,

it does not violate the Sixth Amendment right to a jury trial. California's sentencing system, as an indeterminate system, is therefore constitutional. This can be seen more clearly by applying to the California scheme the same analysis from *Blakely* that we earlier applied to the post-*Booker* federal scheme. See, *supra*, at 14-16.

The facts of this case provide a perfect template. Petitioner was convicted of continuous sexual abuse of a minor, for which the maximum punishment is 16 years imprisonment (not counting enhancements), but the presumptive, middle-term punishment is 12 years. The trial judge then sentenced Petitioner to 16 years based on his (not the jury's) findings that, among other things, (1) the crime was violent, vicious, and callous, (2) the victim was young and vulnerable, and (3) petitioner sought to coerce the victim to recant his statements about the crime.

As with the federal example provided earlier, although it is possible to argue that Petitioner had the legal *right* to the lesser sentence of 12 years, that view is mistaken. Petitioner is not *entitled* to no more than 12 years merely because the jury did not find the facts that formed the basis for the judge's upward departure. He knew he was risking a sentence of 16 years in jail for the offense when he committed it. Although he might have received a lesser sentence had his conduct been less reprehensible, that does not give the run-of-the-mine sexual predator in California an entitlement to the lesser sentence. The broad discretion the California sentencing system vests in the sentencing judge forecloses that result. See *Black*, 113 P.3d at 547 ("the judge has considerable discretion to select among the upper, middle, and lower terms").

By contrast, Petitioner *is* entitled to a sentence of no more than 16 years if he did not commit any of the specific facts that, if found by a jury beyond a reasonable doubt, authorize a sentence to be *enhanced* and thereby exceed the upper term. Those facts – which include use of a deadly weapon and the sale of particular quantities of drugs – "have a fixed and predictable sentencing consequence" (Berman, *supra*, at 16), which creates the sort of entitlement to which *Blakely* referred. The same cannot be said of facts found by California judges in the course of exercising their discretion as to which of the three terms to impose. See *Hernandez*, *supra*, 757 P.2d at 1018-20 (drawing precisely this line between statutory enhancements, on the one hand, aggravating and mitigating factors, on the other).

Finally, it bears responding to the following syllogism relied upon by Petitioner and his amici: (1) the California sentencing system is virtually identical to the Washington sentencing system at issue in *Blakely*; (2) this Court held in *Blakely* that the Washington sentencing system violated the Sixth Amendment; therefore (3) the California sentencing system, too, must violate the Sixth Amendment. See Pet. Br. 18-20; NACDL Br. 7. The problem with this syllogism is that its major premise is flawed. The California sentencing system, as construed by the California Supreme Court in *Black*, does not operate in the same manner as the Washington sentencing system this Court addressed in *Blakely*.

As an initial matter, the Washington sentencing system was "similar to the Federal Sentencing Guidelines," *Booker*, 543 U.S. at 231-32, establishing "presumptive sentencing ranges" based on "seriousness [of offense] levels" and "offender scores" applied to a sentencing grid.

Wash. Rev. Code §§9.94A.310-360 (1997). As in the federal system, judges could then depart upward or downward based on various factual findings made by the judge by a preponderance of the evidence. *Id.* §§9.94A.370 and 9.94A.390. The California sentencing system, as noted earlier, does not resemble the Federal Sentencing Guidelines.

More fundamentally, the Washington Supreme Court, unlike the California Supreme Court, never construed "the requirement that an aggravating factor exist" before the judge may sentence a defendant to the upper term as "merely a requirement that the decision to impose the upper term be *reasonable*." *Black*, 113 P.3d at 544. That makes all the difference. By construing the California statute in that way, the California Supreme Court effectively read the statute as authorizing indeterminate sentencing. In Washington, by contrast, a defendant was entitled to a sentence within the presumptive sentencing range unless the judge found facts that provided "substantial and compelling reasons justifying an exceptional sentence." *Id.* §§9.94A.120(1) and (2). A Washington judge's discretion to impose an "exceptional sentence" was, therefore, tightly confined. Whereas the middle term in California is merely a neutral point from which judges could freely go above or below based on their reasonable exercise of discretion, the presumptive sentencing range in Washington placed a huge thumb on the scale in favor of the guidelines range that could only be overcome by a judge's finding of compelling aggravating facts.[3] As a consequence,

[3] In 2003 and 2004, Washington judges imposed sentences above the presumptive sentencing range in a mere three percent of the cases. Washington State Sentencing Guidelines Comm'n, *Statistical Summary*

(Continued on following page)

the Washington sentencing scheme could only be described as determinate.

In the final analysis, equating the California sentencing system with the Washington system (for *Blakely* purposes) is as implausible as equating the pre-*Booker* federal system with the post-*Booker* federal system. The two systems have surface similarities but also fundamental distinctions that are outcome determinative. The California sentencing system satisfies *Blakely*'s dictates.

III. A ruling that California's sentencing system violates the Sixth Amendment would have serious consequences for the states.

1. This Court has recognized that "[o]ur traditional deference to legislative policy choices finds a corollary in the principle that the Constitution does not mandate adoption of any one penological theory." *Ewing v. California*, 538 U.S. 11, 25 (2003) (internal quotation marks omitted). The wide variety of state sentencing systems attests to the vitality of that principle. Amicus NACDL nevertheless asserts that the Court should not hesitate to invalidate California's sentencing system because the State – and, presumably, any other State – "would find it easy to apply a *Blakely*-ized version of [its] sentencing system." NACDL Br. 24. Such reasoning cannot be squared with our Federalism. Choosing a place on the spectrum between a pure indeterminate sentencing system and pure determinate ("charge offense") sentencing system is a policy decision involving an array of tradeoffs

---

of Adult Felony Sentencing, Fiscal Year 2004, at 22, *cited in Black*, 113 P.3d at 546 n.14.

that is for each State to make. If this Court were to hold that California's sentencing system violates the Sixth Amendment, every State would find that its ability to structure its criminal justice system as its citizens see fit has been diminished. That the option of *Blakely*-izing remains is utterly beside the point.

It is true, as the NACDL observes (Br. 15-20), that Kansas responded to *Apprendi* by requiring jury factfinding of aggravating factors, and that six other States responded to *Blakely* by doing likewise.[4] That observation, however, does not answer the pivotal questions of how well these *Blakely*-ized systems are working in practice, whether such a system would work as a practical matter in *other* States, and whether the legislatures of other States wish to make the same policy tradeoffs as the seven *Blakely*-ized States.

The dissents of Justices O'Connor and Breyer in *Blakely* set forth many of the practical problems that would attend requiring juries to find all aggravating factors beyond a reasonable doubt. Some facts relevant to sentencing – such as whether the defendant acts in an obstructive manner at trial – cannot be known in advance of the trial. *Blakely*, 542 U.S. at 319 (O'Connor, J., dissenting). Other facts relevant to sentencing – such as the character of the defendant – are not suitable for jury consideration. *Id.* at 318-19. And many defendants would be prejudiced were they forced to contest aggravating facts in the guilt phase of their trials. *Id.* at 334-35 (Breyer, J.,

---

[4] See Alaska Stat. §12.55.155 (2006); Ariz. Rev. Stat. §13-702.02 (2006); Kan. Stat. Ann. §21-4716(b) (2005); Minn. Stat. §244.10 (2006); N.C. Gen. Stat. §15A-1340.10 (2006); Act of June 29, 2005, 2005 Oregon Laws 463 §§3(1), 4(1); Wash. Rev. Code §9.94A.537 (2006).

dissenting). Addressing these concerns by empanelling a second, sentencing jury "would be costly, both in money and in judicial time and resources." *Id.* at 336.

Another distinct concern with *Blakely*-ized systems is that they allow prosecutors to control the punishment by selecting which specific aggravating factors to charge. *Id.* at 334. An outgrowth of that increased prosecutorial power is a reduction in uniformity of punishment for the same *real* criminal conduct; uniformity will only be obtained with respect to the same *charged* conduct. *Id.* Yet tying "real punishment to real conduct" has been at the heart at sentencing reforms "[f]or more than a century." *Id.* at 339.

We do not know the extent to which these problems have surfaced in the seven *Blakely*-ized States. What we can infer is that the *Blakely* jury-factfinding model most naturally appeals to states that "will not have to make use of jury sentencing proceedings very often." Reitz, 105 Colum. L. Rev. at 1112. By contrast, the more complex a State's sentencing scheme, the more often juries would be required to find traditional sentencing facts, and the more often separate sentencing juries would have to be impaneled, the less appealing is the *Blakely* jury-factfinding model. As it turns out, more States presently have advisory guideline systems (*Booker*-ized systems) than have *Blakely*-ized systems.[5]

---

[5] Nine States and the District of Columbia used advisory guideline systems prior to *Booker*. See Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 Fed. Sent'g Rep. 233, 239 n.2 (2005) (listing Arkansas, Delaware, the District of Columbia, Louisiana, Maryland, Missouri, Rhode Island, Utah, Virginia, and Wisconsin). Since *Booker*, Indiana and Tennessee amended their statutes to make their guidelines systems advisory. Ind. Code §35-50-2-1.3(a) (2006);

(Continued on following page)

In the end, it is for state legislatures to weigh the costs and benefits of the competing options and to select the one that best conforms to their respective penological and budgetary priorities. Some States will conclude that the costs of a *Blakely*-ized system are a small price to pay for reduced judicial discretion and an increased role for juries. Other States will decide they wish to place more power in the hands of judges or parole boards. And still other States will try to retain their determinate systems by increasing the top of their guideline ranges to the statutory maximums for each offense.[6] (California could similarly choose to make the upper terms the presumptive terms from which judges would have only the discretion to depart downward.) The genius of our constitutional design is its embrace of this diversity. See *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("the theory and utility of our federalism are revealed" when "the States may perform their roles as laboratories for experimentation to devise various solutions where the best solution is far from clear").

We are not suggesting, of course, that a State may enact a sentencing system that violates a constitutional proscription. But let there be no doubt that an overly-expansive reading of those proscriptions imposes serious costs to the States. And it is no answer to that objection to

---

Tenn. Code Ann. §40-35-210(c) (2005). And two state Supreme Courts have concluded that *Booker* fixes are more suitable for their States than *Blakely* fixes. See *State v. Foster*, 845 N.E.2d 470 (Ohio 2006); *State v. Natale*, 878 A.2d 724 (N.J. 2005).

[6] See Frank Bowman, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with Blakely v. Washington*, 16 Fed. Sent. R. 364 (2004).

observe (as the NACDL does) that States retain the option of *Blakely*-izing.

2. Petitioner takes a slightly different tack, arguing that the California Supreme Court should have held that the California sentencing system violates *Blakely*, and then let the California Legislature cure the problem by, perhaps, adopting a *Booker*-like advisory system. Pet. Br. 28. This argument fails on several levels. As explained in Sections I and II, *supra*, the California Supreme Court's decision in *Black* has already construed the California sentencing system to operate in a manner very similar (if not identical) to *Booker*-ized systems. By reading "the requirement that an aggravating factor exist" before the judge may sentence a defendant to the upper term as "merely a requirement that the decision to impose the upper term be *reasonable*," *Black*, 113 P.3d at 544, the California Supreme Court construed the California sentencing law to be an indeterminate system. It would be the height of formalism to overturn that opinion on the ground that the court did not use the term "advisory."

It would likewise be the height of formalism to overturn the California Supreme Court's opinion on the ground that the court should have first held that the sentencing statute, as literally written, violates *Blakely*, and only then adopted its construction of the statute as a remedial fix. The California Supreme Court's construction of the State's sentencing system is definitive. See *Ring v. Arizona*, 536 U.S. 584, 603 (2002) ("the Arizona court's construction of the State's own law is authoritative"). It is not for petitioners, or this Court, to second guess how the court arrived at its construction. To be sure, the California Legislature – and state legislatures around the country – have the final word on how their respective sentencing

systems should be structured in the wake of *Blakely* and *Booker*. That is no reason, however, for particular judicial constructions or remedies of statutes to be rejected as inadequate, as Petitioner suggests.

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

MARK J. BENNETT
Attorney General of Hawaii
DOROTHY D. SELLERS
KIMBERLY A. TSUMOTO*
Deputy Attorneys General
*Counsel of Record
Department of the
Attorney General
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Amicus Curiae State of Hawaii

Of Counsel:
DAN SCHWEITZER
750 First Street, N.E.,
Suite 1100
Washington, D.C. 20002
(202) 326-6010

July 12, 2006

(3)

No. 05-6551

FILED
MAY 8 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

John Cunningham,

Petitioner,

v.

The State of California,

Respondent.

On Writ of Certiorari to the California Court of Appeal,
First Appellate District, Division Five

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Jeffrey L. Fisher
(Counsel of Record)
DAVIS WRIGHT TREMAINE LLP
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150

Thomas C. Goldstein
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

May 8, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 4
I. California's Sentencing System Contravenes the Rule Set Forth in *Apprendi* and *Blakely*. 4
A. California's Sentencing System Implicates the Sixth Amendment Because It Necessitates Factfinding Beyond the Jury Verdict to Impose a Sentence Longer than the Middle Term 4
B. Allowing Judges to Increase Sentences Based on Legislatively Mandated Sentencing Factors Offends the Separation-of-Powers Principles that Animate the Sixth Amendment in Ways that Indeterminate Sentencing Systems Do Not. ... 11
II. The Experience of the States Thus Far Demonstrates the Workability of the Rule Set Forth in *Apprendi* and *Blakely* 15
A. Most States Have *Blakely*-ized Affected Systems, and Their New Systems Work Well 15
B. California Has Already Shown Its System Can Be Brought Into Compliance with *Blakely* Without Great Difficulty 23
CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) ..... passim
Batson v. *Kentucky*, 476 U.S. 79 (1986)..... 14
Blakely v. *Washington*, 542 U.S. 296 (2004)..... passim
Goldberg v. *Kelly*, 397 U.S. 254 (1970)..... 14
Harper v. *State Bd. of Elections*, 383 U.S. 663 (1966) 14
Jones v. *United States*, 526 U.S. 227 (1999) 12
Kramer v. *Union Free School Dist.*, 395 U.S. 621 (1969)..... 14
Lopez v. *People*, 113 P.3d 713 (Colo. 2005)..... 8, 9, 20
Milligrock v. *State*, 118 P.3d 11 (Alaska Ct. App. 2005)..... 8
Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 13
Palmer v. *Thompson*, 403 U.S. 217 (1971) 14
People v. *Black*, 113 P.3d 534 (Cal. 2005)..... passim
People v. *Butler*, 19 Cal. Rptr. 3d 310 (Cal. Ct. App. 2004) 5
People v. *Cunningham*, No. A103501, 2005 WL 880983 (Cal. Ct. App. Apr. 18, 2005) 11
People v. *George*, 18 Cal. Rptr. 3d 651 (Cal. Ct. App. 2004) 5
People v. *Harless*, 22 Cal. Rptr. 3d 625 (Cal. Ct. App. 2004) 5
People v. *Vu*, 21 Cal. Rptr. 3d 844 (Cal. Ct. App. 2004) 6
Ring v. *Arizona*, 536 U.S. 584 (2002) 4, 6
Smith v. *Massachusetts*, 543 U.S. 462 (2005) 14
Smylie v. *State*, 823 N.E.2d 679 (Ind. 2005) 8, 9
State v. *Allen*, 615 S.E.2d 256 (N.C. 2005) 8
State v. *Brown*, 99 P.3d 15 (Ariz. 2004)..... 8, 21
State v. *Dilts*, 103 P.3d 95 (Or. 2004)..... 8, 21
State v. *Foster*, 845 N.E.2d 470 (Ohio 2006)..... 8, 21, 22
State v. *Gomez*, 163 S.W.3d 632 (Tenn. 2005) 10, 15

State v. *Gould*, 23 P.3d 801 (Kan. 2001) 7
State v. *Hughes*, 110 P.3d 192 (Wash. 2005) 21
State v. *Lopez*, 123 P.3d 754 (N.M. 2005) 10, 22
State v. *Natale*, 878 A.2d 724 (N.J. 2005) 8, 9, 10, 21
State v. *Shattuck*, 704 N.W.2d 131 (Minn. 2005) 8, 21, 23
State v. *Wilbur*, 278 A.2d 139 (Me. 1971) 14
United States v. *Booker*, 543 U.S. 220 (2005) ..... passim
United States v. *Maybury*, 274 F.2d 899 (CA2 1960) 13
Williams v. *New York*, 337 U.S. 241 (1949) 11

Statutes

Act of Apr. 17, 2006, Ariz. 2006 Legis. Serv. 148 20
Act of June 29, 2005, 2005 Or. Laws 463 19
Alaska Stat. 12.55.125(c) (2006) 19
Alaska Stat. 12.55.155(f) (2006) 19
Ariz. Rev. Stat. 13-702.01 (2006) 20
Cal. Health & Safety Code 11370.4 (2006) 25
Cal. Penal Code 1170(b) (2006) 5, 7
Cal. Penal Code 12022(a) (2006) 25
Cal. Penal Code 12022(b) (2006) 25
Cal. Penal Code 12022.6 (2006) 25
Cal. Penal Code 193(a) (2006) 11
Cal. Penal Code 208(a) (2006) 11
Cal. Penal Code 213(a)(1)(B) (2006) 11
Cal. Penal Code 288.5(a) (2006) 11
Cal. Penal Code 667.9(a) (2006) 25
Cal. Rules of Court 4.421(a) (2006) 25
Ind. Code 35-50-2-1.3(a) (2006) 21
Kan. Stat. Ann. 21-4716(b) (2005) 17
Kan. Stat. Ann. 21-4718(b)(4) (2005) 17
Minn. Stat. 244.10(5) (2006) 18
N.C. Gen. Stat. 15A-1340.16(a1) (2006) 19
Tenn. Code Ann. 40-35-210 (2005) 20

Tenn. Code Ann. 40-35-401(b)(3) (2005) 21
Wash. Rev. Code 9.94A.537 (2006) 16

Other Authorities

Adam Liptak, *Justices' Sentencing Ruling May Have Model in Kansas*, N.Y. Times, July 13, 2004 17
Alaska Judicial Council, *Alaska Felony Process: 1999* (2004) 23
Brent Kendall, *Supreme Court Puts Sentencing in California on Shaky Ground*, Daily Journal, Feb. 22, 2006 24
Charles Wilson, *New Law May Trigger Wave of Appeals*, Evansville Courier & Press, July 5, 2005 21
Dale G. Parent & Richard S. Frase, *Why Minnesota Will Weather* Blakely*'s Blast*, 18 Fed. Sent'g Rep. 12 (2005) 18
Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681 (1992) 12
Editorial, *Ohio's Sentencing Laws Need Urgent Fix*, Cincinnati Enquirer, Mar. 1, 2006. 22
Jon Wool & Don Stemen, *Aggravated Sentencing:* Blakely v. Washington, *Practical Implications for State Sentencing Systems* (Vera Institute of Justice 2004) 7
Kate Stith, *Crime and Punishment Under the Constitution*, 2004 Sup. Ct. Rev. 221 7
Lenell Nussbaum, *Sentencing in Washington After* Blakely v. Washington, 18 Fed. Sent'g Rep. 23 (2005) 16, 17
Memorandum from Dave Diroll & Scott Anderson, Ohio Criminal Sentencing Commission, to Judges and Other Interested Parties re: Felony Sentencing After *Foster* (Mar. 28, 2006) 22

Memorandum from J. Richard Couzens, Placer County Superior Court Judge, and Tricia A. Bigelow, Los Angeles County Superior Court Judge, *Application of* Blakely vs. Washington *to California Courts* (July 23, 2004) 24

Minn. Sent'g Guidelines Comm'n, *Report to the Legislature* (Jan. 2006) 18

Minn. Sent'g Guidelines Comm'n, *The Impact of* Blakely v. Washington *on Sentencing in Minnesota: Long Term Recommendations* (Sept. 2004) 18, 24

Minn. Sent'g Guidelines Comm'n, *The Impact of* Blakely v. Washington *on Sentencing in Minnesota: Short Term Recommendations* (Aug. 2004) 17

Peter J. Rubin, *Homicide*, 28 Me. L. Rev. 57 (1976) 14

Press Release, Criminal Sentencing Bill Signed into Law (Mar. 22, 2005) 19

Ronald F. Wright, Blakely *and the Centralizers in North Carolina*, 18 Fed. Sent'g Rep. 19 (2005) ... 18, 19, 23

State of Oregon Criminal Justice Commission, *Sentencing Practices: Summary Statistics for Felony Offenders Sentenced in 2001* (2003) 23

Tom Lininger, *Oregon's Response to* Blakely, 18 Fed. Sent'g Rep. 29 (2005) 17, 19

Tony Ortiz, *The New Mexico Sentencing Commission's Legislative Proposal Subsequent to* Blakely v. Washington, 18 Fed. Sent'g Rep. 54 (2005) 22

Constitutional Provision

U.S. Const. amend. VI ..... passim

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 11,200 attorneys and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors.[1] NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights, including the right to a trial by jury at issue in this case, and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. To promote these goals, NACDL has frequently appeared as *amicus curiae* before this Court in all manner of cases concerning substantive criminal law and criminal procedure, including *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), *Ring* v. *Arizona*, 536 U.S. 584 (2002), *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). Because the decision below is contrary to the rule set forth by this Court in *Apprendi*, *Ring*, *Blakely*, and *Booker*, NACDL respectfully submits this brief *amicus curiae* in support of petitioner.

---

[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, and no person or entity, other than *amicus*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. This Court need not break any new ground to hold that California's determinate sentencing system violates the Sixth Amendment.

A. It is, by now, settled that the Sixth Amendment prohibits states from imposing sentences beyond statutory maximums on the basis of facts not tried to a jury or admitted by the defendant. California's Determinate Sentencing Law runs afoul of this clear proscription. Under that law, judicial factfinding exposes criminal defendants such as petitioner to harsher punishments than jury verdicts alone allow. That is all this Court needs to know. Indeed, over the past two years, courts in nearly all of the twelve other states that had similar determinate sentencing systems in place after this Court's decision in *Blakely* v. *Washington*, 542 U.S. 296 (2004), have had little difficulty recognizing the systems' constitutional infirmity. This Court should simply bring the final few outliers, including California, into compliance.

B. The California Supreme Court's error derives from a fundamental misunderstanding of *Blakely* and this Court's subsequent decision in *United States* v. *Booker*, 543 U.S. 220 (2005). The California Supreme Court wrongly believed that the Sixth Amendment primarily concerns how much sentencing discretion judges may have, and that if judges in a determinate sentencing system have discretion comparable to that which they may have in an indeterminate sentencing system, then the former must be constitutional. Not so. The Sixth Amendment is not so much a limitation on judicial power as it is a reservation of jury power against legislative and executive encroachment. It prohibits legislatures from criminalizing or gradating behavior without affording the procedural protections that must accompany such laws, and thereby progressively eroding the relevance of the jury trial to a mere formality. And it prohibits prosecutors from seeking greater punishment than is otherwise allowed based on accusations they are unwilling or unable to prove in the

traditional adversarial process. To be sure, lawmakers may evade these Sixth Amendment prohibitions by limiting criminal codes to generalized crimes and broad, indeterminate sentences. But over the long run, structural democratic impulses will push legislatures to strive toward proportionate and predictable punishment, notwithstanding the procedural protections that must accompany progressive legislation.

II. Recent state sentencing legislation confirms that the rule set forth in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* is not only theoretically sound but also is practically workable.

A. Complying with the Sixth Amendment has caused neither widespread chaos nor the abandonment of sentencing reform in state criminal justice systems. Over the past few years, seven of the nine state legislatures that have amended their laws have "*Blakely*-ized" their sentencing systems by requiring aggravating factors to be tried to juries. Colorado's high court also *Blakely*-ized its state system by judicial decision and the New Mexico House has passed a bill that would do the same. While a couple of states affected by *Blakely* have retreated somewhat from determinate sentencing regimes, not a single one has done what this Court's dissenters in *Blakely* feared the most: returned to a true indeterminate sentencing system.

B. California's system likewise is amenable to *Blakely*-ization. After this Court's decision in *Blakely*, but before the California Supreme Court's refusal to follow it in *People* v. *Black*, 113 P.3d 534 (Cal. 2005), some California trial and appellate courts were assuming that *Blakely* applied and were behaving accordingly. All indications are that these interim procedures worked just fine. And the state sentencing system has long followed the dictates of *Blakely* with respect to sentence "enhancements," many of which are extremely similar to aggravating facts. In any event, the relative prospects for incorporating *Blakely* into the state's existing determinate sentencing system are not paramount here. The

most important thing this Court can, and should, do is to continue insisting that states respect the constitutional ground rules for sentencing reform. The jury's role in the criminal justice system is far too vital ever to be marginalized for the sake of expediency or efficiency.

ARGUMENT

I. California's Sentencing System Contravenes the Rule Set Forth in *Apprendi* and *Blakely*.

This case calls for nothing more than the simple application of the rule articulated in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny to California's determinate sentencing system. The plain text of the California statute reveals that the law violates the Sixth Amendment in precisely the same manner as the regimes invalidated in *Apprendi*, *Ring* v. *Arizona*, 536 U.S. 584 (2002), *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). Indeed, most other states with similar regimes have already recognized that their systems were constitutionally infirm. There is nothing special about California's system that exempts it from the separation-of-powers concerns that animate *Apprendi*.

A. California's Sentencing System Implicates the Sixth Amendment Because It Necessitates Factfinding Beyond the Jury Verdict to Impose a Sentence Longer than the Middle Term.

1. *Apprendi* and *Blakely* provide a straightforward, "bright-line rule" regarding the constitutionality of sentencing decisions made by judges. *Blakely*, 542 U.S. at 308. The rule is that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 301 (quoting *Apprendi*, 530 U.S. at 490). This Court clarified in *Blakely* that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any

additional findings." 542 U.S. at 303-304 (emphasis in original). Thus, with the sole exception of the fact of a prior conviction (which is not at issue here), a judge cannot rely on facts neither found by a jury nor admitted by a defendant to increase a defendant's sentence beyond the maximum that state law would otherwise authorize. See *id.* at 301.

The California determinate sentencing scheme plainly runs afoul of this command. The California Penal Code states, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term* unless there are circumstances in aggravation or mitigation of the crime." § 1170(b) (emphasis added). A fact cannot constitute an aggravating fact unless it involves something beyond the elements of the crime of conviction – that is, something beyond the jury's verdict. See *People* v. *Black*, 113 P.3d 534, 538 (Cal. 2005) ("In imposing the upper term sentence, the court may not consider any fact that is an essential element of the crime itself * * *."). Thus, as the dissenting judge in the California Supreme Court recognized – in accord with numerous divisions of the California Court of Appeal – "the statutory maximum, that is, 'the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*,' is the middle term of imprisonment." *Id.* at 553 (Kennard, J., dissenting) (quoting *Blakely*, 542 U.S. at 303).[2]

---

[2] For a selection of pre-*Black* opinions to this effect from the California Court of Appeal, see *People* v. *Harless*, 22 Cal. Rptr. 3d 625, 645 (Cal. Ct. App. 2004) ("The emerging majority view is that * * * the maximum penalty the court can impose under California law without making additional factual findings is the middle term."); see also *People* v. *Butler*, 19 Cal. Rptr. 3d 310, 315 (Cal. Ct. App. 2004) (holding that *Blakely* "flatly contradicted" the State's argument that the upper term could be imposed without violating the Sixth Amendment); *People* v. *George*, 18 Cal. Rptr. 3d 651, 655 (Cal. Ct. App. 2004) (holding that "[b]ecause the maximum penalty the court can impose under California law

2. Declining to hold that the California determinate sentencing system violates the Sixth Amendment would throw the law into a state of deep uncertainty, for there is absolutely no relevant distinction between California's system and the sentencing regimes that this Court found unconstitutional in *Ring*, *Blakely*, and *Booker*. In *Ring*, this Court overturned a death sentence because "[b]ased solely on the jury's verdict * * * the maximum punishment [Ring] could have received was life imprisonment." 536 U.S. at 597. Arizona law "authorize[d] the judge to sentence the defendant to death" only with the finding of "at least one aggravating circumstance" from an enumerated list. *Id.* at 592-93 (citation omitted). Because a sentencing judge, and not a jury, made such factual findings, the capital sentencing law violated the Sixth Amendment. *Id.* at 609.

This Court subsequently made clear that *Apprendi* applies equally to non-capital determinate sentencing systems. In *Blakely*, this Court applied *Apprendi* to the State of Washington's sentencing system, which required a judge to impose a "standard range" for various crimes unless there was a "substantial and compelling" reason to impose a higher (so-called "exceptional") sentence. *Blakely*, 542 U.S. at 299. In order to find such a reason, a judge was required to find an "aggravating factor," either from an enumerated list or involving something else beyond the elements of the crime. *Ibid.* Similarly, in *Booker*, this Court invalidated section 3553(b) of the Federal Sentencing Guidelines, which commanded that a court "*shall* impose a sentence of the kind, and within the range established by the Guidelines, subject to departures in specific, limited cases." 543 U.S. at 234 (emphasis in original) (quotation omitted). Because the jury verdict itself in *Booker* did not authorize the judge to impose

---

without making additional factual findings is the middle term, *Blakely* applies"); *People* v. *Vu*, 21 Cal. Rptr. 3d 844, 852 (Cal. Ct. App. 2004) (same). The California Supreme Court "depublished" these opinions in light of its decision in *Black*.

a sentence above a certain threshold, the judge's factfinding to support the defendant's sentence ran afoul of *Apprendi* and *Blakely*. See *id.* at 235.

In language nearly identical to the statutes invalidated in *Blakely* and *Booker*, California Penal Code section 1170(b) states that, "the court *shall order imposition of the middle term* unless there are circumstances in aggravation or mitigation of the crime." (emphasis added). All three sentencing systems violate the Sixth Amendment for the same reason: they permit a judge, based on his own factfinding, to impose a sentence greater than the maximum term authorized by the jury's verdict. In California, a judge may depart from the middle term "only upon the finding some additional fact" – a finding that the judge, rather than the jury, makes. *Booker*, 543 U.S. at 235; *Blakely*, 542 U.S. at 305. Under this Court's clearly articulated Sixth Amendment jurisprudence, this system cannot stand.

3. Confirming that California's sentencing system violates the Sixth Amendment will cause little impact beyond that which *Apprendi* and *Blakely* have already had. After this Court decided *Apprendi,* the Kansas Supreme Court recognized that its determinate sentencing system needed to be reconfigured. See *State* v. *Gould*, 23 P.3d 801 (Kan. 2001), cited with approval in *Blakely*, 542 U.S. at 309. And after this Court decided *Blakely*, commentators and sentencing experts quickly identified the twelve states besides Kansas and Washington whose sentencing systems were "functionally equivalent" to those states' regimes. See Jon Wool & Don Stemen, *Aggravated Sentencing:* Blakely v. Washington, *Practical Implications for State Sentencing Systems* 1-2 (Vera Institute of Justice 2004), *available at* http://www.vera.org/publication_pdf/242_456.pdf (listing states); see also Kate Stith, *Crime and Punishment Under the Constitution*, 2004 Sup. Ct. Rev. 221, 223 n.17 (same).

Over the past two years, high courts in seven of these twelve states and a binding decision from an intermediate

court in another already have properly applied this Court's directives to their states' sentencing systems. See *State* v. *Brown*, 99 P.3d 15 (Ariz. 2004) (en banc); *Lopez* v. *People*, 113 P.3d 713 (Colo. 2005) (en banc); *Smylie* v. *State*, 823 N.E.2d 679 (Ind. 2005); *State* v. *Shattuck*, 704 N.W.2d 131 (Minn. 2005) (en banc); *State* v. *Natale*, 878 A.2d 724 (N.J. 2005); *State* v. *Allen*, 615 S.E.2d 256 (N.C. 2005); *State* v. *Foster*, 845 N.E.2d 470 (Ohio 2006); *State* v. *Dilts*, 103 P.3d 95 (Or. 2004); *Milligrock* v. *State*, 118 P.3d 11 (Alaska Ct. App. 2005). The decisions from the Arizona, Colorado, Indiana, and New Jersey Supreme Courts deserve special mention because those states' sentencing systems so closely resembled California's.

Brown involved a case in which Arizona state law dictated that a defendant "*shall* receive a sentence of five years" for a class two felony. 99 P.3d at 17 (emphasis added) (internal quotation and citation omitted). The Arizona Supreme Court rejected the state court of appeals' conclusion that the relevant statutory maximum for *Apprendi* purposes was a "twelve-and-one-half year super-aggravated sentence," *id.* at 16, that could be imposed only if a judge found "at least two substantial aggravating factors." *Id.* at 18 (internal quotation and citation omitted). Instead, in a brief, five-page opinion, the court concluded – as the State ultimately conceded – that "[b]ecause a sentence in excess of five years could be imposed on [the defendant] only after a finding of one or more * * * aggravating circumstances * * * the Sixth Amendment guarantee of jury trial extends to the finding of these facts and requires proof beyond a reasonable doubt." *Ibid.*

Colorado's high court followed a similar path in *Lopez*. Using mandatory language analogous to California's sentencing law, the Colorado statute at issue provided that "the court *shall impose a definite sentence which is within the presumptive ranges* set forth * * * unless it concludes that extraordinary mitigating or aggravating circumstances are present * * *." *Lopez*, 113 P.3d at 724 (emphasis added)

(internal quotation and citation omitted). Applying *Apprendi* and *Blakely*, the court concluded that

> the trial judge must impose a sentence within the presumptive range unless he or she engages in the extraordinary aggravating or mitigating circumstances analysis. If that analysis requires judicial fact-finding to which the defendant has not stipulated, then the rule of *Blakely* applies and any additional facts used to aggravate the sentence must be *Blakely*-compliant or *Blakely*-exempt.

Id. at 726. Facts that are *Blakely*-compliant or *Blakely*-exempt are: "(1) facts found by a jury beyond a reasonable doubt; (2) facts admitted by the defendant; (3) facts found by a judge after the defendant stipulates to judicial fact-finding for sentencing purposes; and (4) facts regarding prior convictions." *Id.* at 716.

The Indiana Supreme Court also properly applied *Blakely* in *Smylie*. Reasoning from the text of the state sentencing statute, which stated that a defendant "*shall* be imprisoned for a fixed term," the court concluded that Indiana's system was "a regime that requires a given presumptive term for each class of crimes, except when the judge finds aggravating or mitigating circumstances deemed adequate to justify adding or subtracting years." *Smylie*, 823 N.E.2d at 683 (emphasis added). Therefore, the court held, Indiana's "fixed term presumptive sentence" was the statutory maximum for *Apprendi* and *Blakely* purposes, *id.* at 684, and any aggravating facts would henceforth need to be tried to a jury to satisfy the Sixth Amendment. See *id.* at 686.

The Supreme Court of New Jersey reached an identical conclusion in *Natale*. There, the New Jersey sentencing law dictated that "the court *shall* impose the presumptive term" unless the judge found additional facts. *Natale*, 878 A.2d at 738 (emphasis added) (internal quotation and citation omitted). Because the presumptive term was "the maximum sentence" that could be imposed "before any judicial

factfinding," the court held it to be the statutory maximum for *Blakely* purposes and concluded that a sentence beyond the presumptive term violated the Sixth Amendment. *Id.* at 739. The *Natale* Court expressly rejected the California Supreme Court's approach in *Black* "because it appears to be in direct conflict with *Blakely*." *Id.* at 738.

To be sure, the Supreme Courts of Tennessee and New Mexico, like the California Supreme Court, have refused over vigorous dissents to apply *Blakely* to their determinate sentencing systems. See *State* v. *Gomez*, 163 S.W.3d 632, 660-62 (Tenn. 2005), petition for cert. filed, 74 U.S.L.W. 3131 (U.S. Aug. 15, 2005) (No. 05-296); *State* v. *Lopez*, 123 P.3d 754, 768 (N.M. 2005).[3] The Tennessee Supreme Court even reached this conclusion in spite of the state Attorney General's concession on the merits and again in a petition for rehearing that the state sentencing system violated *Blakely*. See *Gomez*, 163 S.W.3d at 661-62, reh'g denied, 163 S.W.3d 632, 672 n.1 (Tenn. 2005).

Nothing about the Tennessee and New Mexico decisions should give this Court pause. The decisions distort the import of *Blakely* and refuse to follow this Court's precedent. This Court should simply finish the job it started in *Apprendi* and require these final outliers to bring their jurisprudence into Sixth Amendment compliance.

---

[3] As in California, these decisions also rejected well reasoned decisions from the states' intermediate courts of appeals. See, *e.g.*, *State* v. *Walters*, No. M2003-03019-CCA-R3CD, 2004 WL 2726034, *15-18 (Tenn. Crim. App. 2004) (unpublished opinion), overruled by *Gomez*, 163 S.W.3d at 632; *State* v. *Frawley*, 106 P.3d 580 (N.M. Ct. App. 2004), overruled by *Lopez*, 123 P.3d at 754.

B. Allowing Judges to Increase Sentences Based on Legislatively Mandated Sentencing Factors Offends the Separation-of-Powers Principles that Animate the Sixth Amendment in Ways that Indeterminate Sentencing Systems Do Not.

The California Supreme Court misapplied *Blakely* because it wrongly analogized the role of judicial factfinding under the Determinate Sentencing Law to the role of judicial factfinding in constitutionally permissible indeterminate sentencing schemes. The Sixth Amendment does not prescribe how much sentencing discretion a judge may have. See *Williams* v. *New York*, 337 U.S. 241, 246 (1949). Rather, it is "a reservation of jury power." *Blakely*, 542 U.S. at 308. It prohibits encroachment – by legislative, executive, or judicial power – on "the jury's traditional function of finding the facts essential to lawful imposition of the penalty." *Id.* at 309.

Sentencing systems such as California's represent just such an encroachment. Elements of basic crimes must be proved to juries beyond a reasonable doubt. But facts that the California Legislature has labeled "aggravating factors" need be proved only to judges, by a preponderance of the evidence, even though these facts expose defendants to significantly increased punishment.[4]

The problem with such a system is not so much that it gives judges extra power at the expense of juries; as the California Supreme Court observed, such a system may at

---

[4] In petitioner's case, the "aggravating factors" found by the district court judge increased his sentence by *one-third*, from twelve years to sixteen. See Cal. Penal Code 288.5(a); *People* v. *Cunningham*, No. A103501, 2005 WL 880983, at *7 (Cal. Ct. App. Apr. 18, 2005). Even larger increases are justified by aggravating factors for first degree robbery (fifty percent, from four years to six), Cal. Penal Code 213(a)(1)(B), kidnapping (sixty percent, from five years to eight), *id.* § 208(a), and voluntary manslaughter (eighty-three percent, from six years to eleven), *id.* § 193(a).

least initially replicate the judge/jury division of labor in the system it replaces. See *Black*, 113 P.3d at 544-45. The problem is that once legislatures are able to gradate offenses without providing the ordinary protections that go along with elements of crimes, they are apt to use "aggravating factors" to create more and more of a "shadow" penal code. Given the "many immediate practical advantages of judicial factfinding," *Blakely*, 542 U.S. at 307 n.10, legislatures will have every incentive to criminalize behavior through such shadow penal codes rather than their official penal codes, thus progressively eroding the relevance of the jury trial to mere "low-level gatekeeping." *Jones* v. *United States*, 526 U.S. 227, 244 (1999).

Leaving determinate sentencing systems like California's beyond the purview of the Sixth Amendment similarly would weaken the jury's checking function against executive overreaching. Absent a prohibition against exempting sentence-enhancing facts from the traditional adversarial process, a dangerous opening would exist for the executive branch to maximize its number of convictions by charging whatever crimes are easiest to prove to juries, while also maximizing punishments by offering less compelling evidence of aggravating factors to judges. See Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1714-15 (1992). Under *Apprendi* and *Blakely*, defendants can force prosecutors to obtain jury verdicts with respect to *all* allegations that subject them to heightened punishment.

To be sure, the Sixth Amendment as explicated in *Apprendi* and *Blakely* allows lawmakers to evade its effect on regimented criminal codes simply by limiting such codes to generalized crimes and broad, indeterminate sentencing ranges. For instance, a legislature could decide to extend "all statutory maximums to, for example, 50 years" and leave it to judges' discretion to reduce sentences below that maximum. *Apprendi*, 530 U.S. at 490 n.16. But the point of the Sixth

Amendment is that it would require such a legislature to be democratically accountable for "expos[ing] *every* defendant" to a maximum "exceeding that which is * * * proportional to the crime." *Ibid.* And it would require legislatures (as well as prosecutors who pursued such charges) to risk juries invoking their power as "circuitbreakers" and refusing to convict defendants, at least in questionable cases. See *Blakely*, 542 U.S. at 306-07 (discussing the "circuitbreaker" power); *United States* v. *Maybury*, 274 F.2d 899, 902 (CA2 1960) (Friendly, J.) (noting that juries may issue verdicts "in the teeth of both law and facts * * * to prevent the punishment from getting too far out of line with the crime") (quotation omitted).

With these counterbalancing incentives properly in place, legislatures interested in creating fairer, more regimented, predictable, and cost-effective systems of punishment remain likely to press ahead, even if it means having to afford defendants the procedural protections that go along with such advances. The aftermath of this Court's decision in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), illustrates the point. In *Mullaney*, this Court confronted a Maine law under which murder and manslaughter were defined as varieties of the same crime – felonious homicide – but were punished differently. *Id.* at 689. If a defendant could show that he had killed the victim because of a sudden provocation or in the heat of passion, he could be convicted only of the less serious offense. Nonetheless, this Court held that the Due Process Clause required the state to prove the factual elements of the more serious crime "beyond a reasonable doubt" rather than to shift the burden to the defendant to prove otherwise. *Id.* at 704. Of course, it would have been possible for the state to respond to this decision by abandoning the murder/manslaughter distinction altogether, subjecting all who killed feloniously to the maximum penalty allowed for murder. But it did not, despite arguments the state had made about the "practical impossibility" of proving the *absence* of sudden provocation or heat of passion. *State* v. *Wilbur*, 278

A.2d 139, 145 (Me. 1971). In fact, Maine law after *Mullaney* divided homicide into six different degrees, each of which carried different levels of punishment and required different factual elements to prove. See Peter J. Rubin, *Homicide*, 28 Me. L. Rev. 57, 57 (1976). The same general story holds true, of course, with respect to countless other crimes that states gradate according to degrees. Each degree is separated from less serious ones by extra facts, and states continue to require prosecutors to prove these extra facts when defendants contest them.

Indeed, the principle that even legislation that extends a benefit must comport with constitutional requirements is familiar across a variety of doctrines, both inside and outside the realm of criminal procedure. See, *e.g.*, *Smith* v. *Massachusetts*, 543 U.S. 462, 474 (2005) (a state need not allow for final acquittals in the middle of a trial, but if it does, such acquittals implicate full Double Jeopardy Clause protections); *Batson* v. *Kentucky*, 476 U.S. 79, 89-91 (1986) (a state need not allow peremptory challenges, but if it does their use must comply with the Equal Protection Clause); *Palmer* v. *Thompson*, 403 U.S. 217, 226 (1971) (a city need not provide a municipal swimming pool, but if it does the pool must be open to all in conformance with the Equal Protection Clause); *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970) (a state need not provide welfare benefits, but if it does it cannot take them away without due process of law); *Kramer* v. *Union Free School Dist.*, 395 U.S. 621, 629 (1969) (a state need not create elected school boards, but "'once the franchise is granted,'" the state has to comply with equal protection constraints with respect to the electorate (quoting *Harper* v. *State Bd. of Elections*, 383 U.S. 663, 665 (1966)). When democratic forces push legislatures to enact such legislation, the Constitution ensures that it is crafted the right way and does not inadvertently undermine fundamental protections upon which all true progress depends.

II. The Experience of the States Thus Far Demonstrates the Workability of the Rule Set Forth in *Apprendi* and *Blakely*.

Not only does this Court's precedent dictate a clear result here, but practical considerations do as well. The overwhelming majority of states affected by *Apprendi* and *Blakely* are retaining determinate sentencing by incorporating into their systems the Sixth Amendment protections that those decisions require. California has not yet followed suit, but evidence indicates that the state could effectively preserve its sentencing priorities by including procedural protections for criminal defendants modeled on the systems of other states.

A. Most States Have *Blakely*-ized Affected Systems, and Their New Systems Work Well.

While Justice O'Connor expressed concern in *Blakely* that "[o]ver 20 years of sentencing reform are all but lost," 542 U.S. at 326 (O'Connor J., dissenting), the majority answered by emphasizing that the case was not about the constitutionality of determinate sentencing but rather "how it can be implemented in a way that respects the Sixth Amendment." *Id.* at 308. The continued flourishing of determinate sentencing post-*Blakely* bears out this assertion.

Seven of the nine states that have enacted legislation to bring themselves into compliance with *Apprendi* and *Blakely* have "*Blakely*-ized" their systems – that is, they have retained determinate sentencing systems by requiring jury factfinding for aggravating factors.[5] Another state has taken this course by means of a judicial opinion, and yet another has legislation in the works to this effect. Only two state legislatures have

---

[5] This count includes the state of Tennessee, whose Attorney General concluded that its law was affected by *Blakely*. A bare majority of the Tennessee Supreme Court later refused to accept that concession. See *State* v. *Gomez*, 163 S.W.3d 632, 661-62 (Tenn. 2005). The legislature amended Tennessee's law anyway.

"*Booker*-ized" their systems – that is, moved away from determinate sentencing systems. Yet even these states have resisted returning to true indeterminate sentencing, instead maintaining non-binding guidelines resembling the federal guidelines after *Booker*.

1. **Washington.** Washington's experience illustrates states' ability to retain effective determinate sentencing systems post-*Blakely*. After this Court invalidated Washington's system for imposing exceptional sentences, the Washington Legislature amended its system to bring it into compliance with the Sixth Amendment. Most significantly, aggravating factors previously found by judges are now required to be alleged in advance and, if contested, proven to a jury beyond a reasonable doubt. Wash. Rev. Code 9.94A.537(1)-(2) (2006). Courts typically submit such allegations to juries as part of a single guilt phase, but the statute allows judges to bifurcate trials when a particularly prejudicial aggravator is at issue. *Id.* § 9.94A.537(3). When the jury finds the existence of an aggravating factor, the judge (as in Washington's previous system) retains discretion to decide whether to impose an enhanced sentence. *Id.* § 9.94A.535.

These changes to Washington's system have effectively minimized *Blakely*'s disruption to the state's sentencing system. One member of the sentencing subcommittee charged with proposing changes to the system described the group's goal as "to provide an amendment that changed the overall statute as little as possible." Lenell Nussbaum, *Sentencing in Washington After* Blakely v. Washington, 18 Fed. Sent'g Rep. 23, 24 (2005). Accordingly, the group declined to make the sentencing guidelines advisory and decided to retain the discretionary nature of upward departures, allowing but not requiring judges to impose enhanced sentences when aggravating factors are found by a jury. *Ibid.*

2. Legislatures in Alaska, Arizona, Kansas, Minnesota, North Carolina, and Oregon also have *Blakely*-ized those

states' determinate sentencing systems. While the details of each of these responses vary, they share a key feature: prosecutors must prove disputed aggravating factors leading to sentences above presumptive terms or presumptive ranges beyond a reasonable doubt to juries. These states' new laws, and the considerations that drove them, are briefly detailed below.

Kansas. Kansas, of course, was the lone state to alter its determinate sentencing system after *Apprendi* but before *Blakely*. Its new system would now be described as *Blakely*-ized: all aggravating factors must be "submitted to a jury and proved beyond a reasonable doubt." Kan. Stat. Ann. 21-4716(b) (2005). Courts possess the discretion, "in the interests of justice," to require aggravating factors to be litigated in a bifurcated proceeding. *Id.* § 21-4718(b)(4).

Kansas' transition to a *Blakely*-ized sentencing system has gone smoothly and served as an exemplar for other states seeking to bring determinate sentencing systems into compliance with *Blakely*. In a case tried shortly after the new system's enactment, a state prosecutor described the impact as adding "about an hour onto a four-day jury trial." Adam Liptak, *Justices' Sentencing Ruling May Have Model in Kansas*, N.Y. Times, July 13, 2004, at A12. The effectiveness of this system led many states to look to Kansas' experience when adapting their sentencing systems to meet Sixth Amendment requirements. See, *e.g.*, Minn. Sent'g Guidelines Comm'n, *The Impact of* Blakely v. Washington *on Sentencing in Minnesota: Short Term Recommendations* 1 (Aug. 2004), *available at* http://www.ussc.gov/STATES/blakely/Minnesota_Blakely.pdf (noting that the state's procedures could "be corrected, as demonstrated by the state of Kansas * * * with limited impact on the criminal justice system as a whole"); Tom Lininger, *Oregon's Response to* Blakely, 18 Fed. Sent'g Rep. 29, 30 (2005) (noting that "Oregon's policy makers settled on the 'Kansas model'"); Nussbaum, *supra*, at 24 (noting that Washington "looked to the experience of Kansas"); Ronald F.

Wright, Blakely *and the Centralizers in North Carolina*, 18 Fed. Sent'g Rep. 19, 20 (2005) (noting that North Carolina "relied on accounts of the Kansas experience").

Minnesota. Minnesota *Blakely*-ized its system by modifying the procedure for making upward departures. Aggravating factors must now be proven to a jury. Minn. Stat. 244.10(5) (2006). In order to ensure continuity in the number of departures and the costs of the system, the state also provided for a unitary trial in most cases and expanded the upper and lower terms of some sentencing ranges. See Dale G. Parent & Richard S. Frase, *Why Minnesota Will Weather* Blakely*'s Blast*, 18 Fed. Sent'g Rep. 12, 16 (2005).

Prior to recommending this fix, Minnesota's sentencing commission determined that *Blakely* would impact only a small subset of the state's sentencing decisions. In 2003, 7.3 percent of felony cases involved sentences that departed from the presumptive sentence because of aggravating factors. Minn. Sent'g Guidelines Comm'n, *The Impact of* Blakely v. Washington *on Sentencing in Minnesota: Long Term Recommendations* 8 (Sept. 2004), *available at* http://www.ussc.gov/STATES/blakely/Minn_Blakely_Gov_Report2.pdf. Thus, the commission concluded that *Blakely* "will not constitute a crisis within the state." *Id.* at 3.

Early results indicate the effectiveness of these modifications. Analyzing data gathered post-*Blakely*, the sentencing commission asserted that the changes "have resulted in maintaining enhanced sentences as an option for consideration when warranted and necessary." Minn. Sent'g Guidelines Comm'n, *Report to the Legislature* 13 (Jan. 2006), *available at* http://www.msgc.state.mn.us/Data%20Reports/LegReportJan06.pdf. And, while the commission has recommended minor changes to the legislature, it emphasized that "[t]he structure of Sentencing Guidelines in Minnesota remains constitutional, as do aggravated departures." *Id.* at 9.

North Carolina. North Carolina's sentencing commission recommended and the state passed a bill preserving determinate sentencing by requiring aggravating

factors to be proven to a jury. N.C. Gen. Stat. 15A-1340.16(a1) (2006). Aggravating factors are generally considered along with the other elements of the crime in a unitary proceeding unless the court determines "the interests of justice" require a separate proceeding. *Ibid.* This response is an effort to maintain continuity with North Carolina's pre-existing sentencing system. State officials value determinate sentencing for its ability to provide predictable sentences, allowing for accurate projection of the state's prison population well into the future. Wright, *supra*, at 20. Following *Blakely*, some state sentencing commissioners recommended moving toward a more discretionary system, but the commission rejected this proposal because it would result in inconsistent sentences. *Id.* at 19-20.

Oregon. Oregon also *Blakely*-ized its system, creating a bifurcated jury procedure for aggravating sentencing factors related to the defendant while providing for a unitary procedure for aggravating factors related to the charged offense. Act of June 29, 2005, 2005 Or. Laws 463, secs. 3(1), 4(1). As in other states, Oregon's response to *Blakely* seeks to retain the benefits of determinate sentencing, including uniform and predictable sentences and the related benefit of improved prison population projections. See Lininger, *supra*, at 33. For this reason, Oregon rejected proposals to return to indeterminate sentencing.

Alaska. Alaska responded to *Blakely* by requiring jury factfinding of aggravating sentencing factors. Alaska Stat. 12.55.155(f) (2006). It also converted presumptive sentence terms into presumptive sentence ranges in several instances. See *id.* § 12.55.125(c). This is an attempt to retain some of the judicial flexibility in the pre-*Blakely* system while also promoting the predictability and procedural protections of determinate sentencing. See Press Release, Criminal Sentencing Bill Signed into Law (Mar. 22, 2005), *available at* http://www.akrepublicans.org/therriault/24/news/ther2005032201p.php (Senate Judiciary Committee Chair describing new

law as bringing "certainty to Alaska's sentencing procedures" while protecting "the rights of defendants").

Arizona. Arizona has also *Blakely*-ized its system, passing legislation requiring jury factfinding for sentences above the presumptive term. See Ariz. Rev. Stat. 13-702.01 (2006) (defining the "trier of fact" for aggravating factors as "a jury, unless the defendant and the state waive a jury in which case the trier of fact means the court"), amended by Act of Apr. 17, 2006, Ariz. 2006 Legis. Serv. 148 (specifying that a court can find aggravating factors relating to previous felony convictions).

3. In one state, the judiciary *Blakely*-ized the system itself. After holding that *Blakely* applied to its sentencing system, the **Colorado** Supreme Court simply *Blakely*-ized the system itself. Under the court's ruling, "the jury can be asked by interrogatory to determine facts potentially needed for aggravated sentencing." *Lopez* v. *People*, 113 P.3d 713, 716 (Colo. 2005). The legislature apparently is content with this solution; this procedure has been on the books for nearly a year now without amendment.

4. Indiana and Tennessee have enacted *Booker*-ized systems in response to *Blakely*. Each has converted formerly presumptive sentences into advisory sentences that allow judges to depart from recommended terms without a finding of fact. While these systems increase judicial discretion, neither is a return to wholly indeterminate sentencing.

Tennessee. Tennessee's new system attempts to retain the consistency in sentencing produced by its former presumptive guidelines. It removes the presumptive nature of certain terms and grants judges discretion to apply any term within the prescribed ranges. However, judges must still "consider" the now-advisory guidelines in crafting sentences. Tenn. Code Ann. 40-35-210(c) (2005). Any factors leading to an enhanced or mitigated sentence must be placed in the record "in order to ensure fair and consistent sentencing." *Id.* § 40-35-210(e). Sentencing decisions are still subject to appellate review for their consistency with the purposes of

sentencing as set out in the sentencing guidelines. *Id.* § 40-35-401(b)(3).

Indiana. Indiana's amended system provides that judges "may voluntarily consider" the state's guidelines when making sentencing decisions. Ind. Code 35-50-2-1.3(a) (2006). This legislation does not entirely do away with the guidelines, but, even so, many are concerned that making the guidelines voluntary will lead to longer sentences. An Indiana Superior Court judge indicated that this weakness of the system could lead to legislative amendment. Charles Wilson, *New Law May Trigger Wave of Appeals*, Evansville Courier & Press, July 5, 2005, at B3. Thus, this *Booker*-ized system may not survive if it does not adequately promote proportionality and predictability in sentencing.

5. **Ohio and New Jersey.** The Supreme Courts of Ohio and New Jersey have been the two most recent high courts to confirm that *Blakely* impacts their states' sentencing systems. See *State* v. *Foster*, 845 N.E.2d 470 (Ohio 2006); *State* v. *Natale*, 878 A.2d 724, 741 (N.J. 2005). Like the vast majority of those before them, both courts ruled that it is up to their states' legislatures to decide how, or whether, to amend the states' laws.[6] It is too soon to know how those legislatures will respond, but the Ohio Supreme Court, for its

---

[6] See, *e.g.*, *State* v. *Brown*, 99 P.3d 15, 18-19 (Ariz. 2004) (en banc) ("We also are mindful that the legislature may choose to moot many such questions * * * by enacting new sentencing statutes."); *State* v. *Shattuck*, 704 N.W.2d 131, 148 (Minn. 2005) ("For us to engraft sentencing-jury or bifurcated-trial requirements onto the Sentencing Guidelines and sentencing statutes would require rewriting them, something our severance jurisprudence does not permit."); *State* v. *Dilts*, 103 P.3d 95, 98 (Or. 2004) ("In response to *Blakely*, prosecutors, the criminal defense bar, and members of the legislature in many states, including Oregon, may be reviewing sentencing procedures for possible modification."); *State* v. *Hughes*, 110 P.3d 192, 196 (Wash. 2005) ("[E]mpanelling juries on remand for re-sentencing would usurp the legislature's authority.").

part, openly invited the state legislature to *Blakely*-ize Ohio's system. See *State* v. *Foster*, 845 N.E.2d 470, 495 (Ohio 2006) ("Certainly the General Assembly may enact legislation to authorize juries to find beyond a reasonable doubt all facts essential to punishment in felony cases."). A leading newspaper in the state has called for the legislature to do precisely this. See Editorial, *Ohio's Sentencing Laws Need Urgent Fix*, Cincinnati Enquirer, Mar. 1, 2006. Additionally, the state's sentencing commission already has recognized that declining to *Blakely*-ize its system could imperil consistency and cost control. See Memorandum from Dave Diroll & Scott Anderson, Ohio Criminal Sentencing Commission, to Judges and Other Interested Parties re: Felony Sentencing After *Foster* 4 (Mar. 28, 2006), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/ocsc_on_foster.doc ("*Foster* eliminates guidance from the statutes designed to assure adequate prison space for the worse [sic] offenders and to make sentences more consistent statewide.").

6. Finally, it bears noting that the **New Mexico** Sentencing Commission has unanimously recommended, and the state House has passed, a bill that would *Blakely*-ize its system. See Tony Ortiz, *The New Mexico Sentencing Commission's Legislative Proposal Subsequent to* Blakely v. Washington, 18 Fed. Sent'g Rep. 54 (2005). That bill, however, has been shelved in light of the New Mexico Supreme Court's unexpected ruling in *State* v. *Lopez*, 123 P.3d 754 (N.M. 2005), that *Blakely* did not affect the state's sentencing system. See Ortiz, *supra*, at 55. Presumably that bill will be revived if this Court reverses in this case and forces the New Mexico Supreme Court to reconsider its position.

B. California Has Already Shown Its System Can Be Brought Into Compliance with *Blakely* Without Great Difficulty.

There is no reason to exempt California from the democratic process that is churning ahead in other states affected by *Blakely*.

1. As has been the case in other states, requiring California to amend its sentencing system in order to bring it into compliance with *Blakely* will not be unduly problematic. The California Supreme Court has noted that sentencing courts rarely impose the upper term. From 1981 to 1988, "the percentage of cases in which the upper term was imposed ranged from 13.36 percent to 17.73 percent." *Black*, 113 P.3d at 546 n.14. This rate of departure from the legally mandated sentence is roughly in line with other states'. In the most recent figures available, Alaska recorded aggravated departures from the presumptive sentence in twenty percent of convictions. See Alaska Judicial Council, *Alaska Felony Process: 1999*, at 81 fig. 8 (2004), *available at* http://www.ajc.state.ak.us/reports/Final%20Version%20of%20Report9.pdf. In Oregon, the figure is approximately eleven percent. See State of Oregon Criminal Justice Commission, *Sentencing Practices: Summary Statistics for Felony Offenders Sentenced in 2001*, at 13 (2003), *available at* http://www.oregon.gov/CJC/SG01v2.pdf (including both dispositional and durational aggravated departures). Minnesota reported a 7.3 percent departure rate in 2003. See *Shattuck*, 704 N.W.2d at 146 n.14. In North Carolina, it is approximately seven percent. See Wright, *supra*, at 22 n.4.

The effects of *Blakely*-ization in California, as elsewhere, will be further mitigated by the fact that even when the state seeks the upper term, the issue will rarely be litigated. The vast majority of defendants will enter into plea deals, waive their right to jury trials, or stipulate to certain aggravating facts in exchange for the State dropping additional charges. See *Blakely*, 542 U.S. at 337 (Breyer, J., dissenting) (noting

that "in 1996, fewer than 4% of adjudicated state felony defendants have jury trials, 5% have bench trials, and 91% plead guilty") (citation omitted); see also Minn. Sent'g Guidelines Comm'n, *The Impact of* Blakely v. Washington *on Sentencing in Minnesota: Long Term Recommendations* 9 (Sept. 2004) (noting that 66% of aggravated departures imposed in 2003 were not contested or were requested by the defendant as part of a plea deal).

In the rare event that prosecutors and defendants cannot reach an acceptable deal and they proceed to trial, courts would find it easy to apply a *Blakely*-ized version of California's sentencing system. Indeed, after this Court's ruling in *Blakely* but before the California Supreme Court's ruling in *Black*, some sentencing courts in California judicially *Blakely*-ized the state's system in their courtrooms without any serious problems. See Brent Kendall, *Supreme Court Puts Sentencing in California on Shaky Ground*, Daily Journal, Feb. 22, 2006, *available at* http://pda-appellateblog.blogspot.com/2006_02_01_pda-appellateblog_archive.html (noting that prior to *Black*, courts in San Francisco "were operating as if *Blakely* applied to California's sentencing law"). Furthermore, immediately following this Court's ruling in *Blakely*, two California superior court judges circulated a memorandum explaining that it was "reasonably probable" that *Blakely* applied to California's system and suggesting several steps courts could take to minimize the extent of *Blakely*'s disruption. See Memorandum from J. Richard Couzens, Placer County Superior Court Judge, and Tricia A. Bigelow, Los Angeles County Superior Court Judge, *Application of* Blakely vs. Washington *to California Courts*, at 1 (July 23, 2004), http://www.fdap.org/downloads/blakely/CouzensBigleowBlakelyMemo.pdf. Among those steps was possibility of submitting disputed aggravating factors to juries. *Id.* at 7. The memorandum questioned whether current California law authorizes such procedural action, but it did not question its workability. *Id.* at 8-9.

Indeed, California courts and litigants already are accustomed to following the basic procedures that *Blakely* requires. For decades, California has conducted jury trials on sentence "enhancement" allegations, many of which present very similar factual questions to those which trials involving aggravating circumstances would require. An "enhancement" under California law is an additional term that is added directly to the base term, just like the "firearm" enhancement in *Blakely* itself that added thirty-six months to the standard sentencing range. See *Blakely*, 542 U.S. at 299. Examples of California enhancements, along with their aggravating-fact counterparts include: using a deadly weapon, Cal. Penal Code 12022(b), and arming with a firearm, *id.* at § 12022(a) (compare Cal. Rules of Court 4.421(a)(2)); inflicting great bodily injury, Cal. Penal Code 12022.7 (compare Cal. Rules of Court 4.421(a)(1)); victim vulnerability, Cal. Penal Code 667.9(a) (compare Cal. Rules of Court 4.421(a)(3)); amount stolen, Cal. Penal Code 12022.6 (compare Cal. Rules of Court 4.421(a)(9)); and quantity of contraband, Cal. Health & Safety Code 11370.4 (compare Cal. Rules of Court 4.421(a)(10)). California prosecutors routinely try these enhancements to juries as part of their cases-in-chief, requiring juries to return special verdicts on the specific enhancement allegations. Consequently, California, like Washington before it, already is familiar with what *Apprendi* and *Blakely* require. All California needs to do is to apply those procedures across the board.

2. Although there is reason to believe that California will join a long and growing list of other states to *Blakely*-ize their determinate sentencing systems, this simply underscores the manageability of the *Apprendi* doctrine. It should not drive this Court's constitutional analysis. See *Blakely*, 542 U.S. at 313 (explaining that constitutional doctrine "cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice"). Accordingly, even if this Court had some reason to believe that the California Legislature would react by amending the state law to re-

institute indeterminate sentencing, that would provide this Court no warrant to flinch from holding that the current system violates the Sixth Amendment.

This Court's duty in this case is to ensure that the ground rules that require legislatures (as well as prosecutors and judges) to respect defendants' Sixth Amendment rights remain in place. Over the long run, that is the best prescription to protect individual liberty and to move toward fairer systems of criminal justice.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be reversed.

Respectfully submitted,

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Jeffrey L. Fisher
(Counsel of Record)
DAVIS WRIGHT TREMAINE LLP
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150

Thomas C. Goldstein
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

May 8, 2006

SUPREME COURT OF THE UNITED STATES

DENVER A. YOUNGBLOOD, JR. *v.* WEST VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 05–6997. Decided June 19, 2006

PER CURIAM.

In April 2001, the State of West Virginia indicted petitioner Denver A. Youngblood, Jr., on charges including abduction of three young women, Katara, Kimberly, and Wendy, and two instances of sexual assault upon Katara. The cases went to trial in 2003 in the Circuit Court of Morgan County, where a jury convicted Youngblood of two counts of sexual assault, two counts of brandishing a firearm, and one count of indecent exposure. The conviction rested principally on the testimony of the three women that they were held captive by Youngblood and a friend of his, statements by Katara that she was forced at gunpoint to perform oral sex on Youngblood, and evidence consistent with a claim by Katara about disposal of certain physical evidence of their sexual encounter. Youngblood was sentenced to a combined term of 26 to 60 years' imprisonment, with 25 to 60 of those years directly attributable to the sexual-assault convictions.

Several months after being sentenced, Youngblood moved to set aside the verdict. He claimed that an investigator working on his case had uncovered new and exculpatory evidence, in the form of a graphically explicit note that both squarely contradicted the State's account of the incidents and directly supported Youngblood's consensual-sex defense. The note, apparently written by Kimberly and Wendy, taunted Youngblood and his friend for having been "played" for fools, warned them that the girls had vandalized the house where Youngblood brought them, and mockingly thanked Youngblood for performing oral

sex on Katara. The note was said to have been shown to a state trooper investigating the sexual-assault allegations against Youngblood; the trooper allegedly read the note but declined to take possession of it, and told the person who produced it to destroy it. Youngblood argued that the suppression of this evidence violated the State's federal constitutional obligation to disclose evidence favorable to the defense, and in support of his argument he referred to cases citing and applying *Brady* v. *Maryland*, 373 U. S. 83 (1963).

The trial court denied Youngblood a new trial, saying that the note provided only impeachment, but not exculpatory, evidence. The trial court did not discuss *Brady* or its scope, but expressed the view that the investigating trooper had attached no importance to the note, and because he had failed to give it to the prosecutor the State could not now be faulted for failing to share it with Youngblood's counsel. See App. C to Pet. for Cert. (Tr. 22–23 (Sept. 25, 2003)).

A bare majority of the Supreme Court of Appeals of West Virginia affirmed, finding no abuse of discretion on the part of the trial court, but without examining the specific constitutional claims associated with the alleged suppression of favorable evidence. 217 W. Va. 535, 548, 618 S. E. 2d 544, 557 (2005) *(per curiam)*. Justice Davis, dissenting in an opinion that Justice Starcher joined, unambiguously characterized the trooper's instruction to discard the new evidence as a *Brady* violation. *Id.*, at 550–552, 618 S. E. 2d, at 559–561. The dissenters concluded that the note indicating that Youngblood engaged in consensual sex with Katara had been suppressed and was material, *id.*, at 550, n. 6, 618 S. E. 2d, at 559, n. 6 (citing *Kyles* v. *Whitley*, 514 U. S. 419, 435, 437–438 (1995)), both because it was at odds with the testimony provided by the State's three chief witnesses (Katara, Kimberly, and Wendy) and also because it was entirely consistent with

Youngblood's defense at trial that his sexual encounters with Katara were consensual, 217 W. Va., at 551–552, 618 S. E. 2d, at 560–561. Youngblood then filed this petition for a writ of certiorari.

A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. See 373 U. S., at 87. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States* v. *Bagley*, 473 U. S. 667, 676 (1985), and *Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor," *Kyles*, 514 U. S., at 438. See *id.*, at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler* v. *Greene*, 527 U. S. 263, 280 (1999) (quoting *Bagley*, *supra*, at 682 (opinion of Blackmun, J.)), although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," *Kyles*, 514 U. S., at 434. The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at 435.

Youngblood clearly presented a federal constitutional *Brady* claim to the State Supreme Court, see Brief for Appellant in No. 31765 (Sup. Ct. App. W. Va.), pp. 42–47, as he had to the trial court, see App. C to Pet. for Cert. (Tr. 6, 44–45, 50, 51 (Sept. 25, 2003)); *id.*, at 13, 17 (Sept. 29, 2003). And, as noted, the dissenting justices discerned the significance of the issue raised. If this Court is to reach the merits of this case, it would be better to have the

benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue. We, therefore, grant the petition for certiorari, vacate the judgment of the State Supreme Court, and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

DENVER A. YOUNGBLOOD, JR. *v.* WEST VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 05–6997. Decided June 19, 2006

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In *Lawrence* v. *Chater*, 516 U. S. 163 (1996) *(per curiam)*, we greatly expanded our "no-fault V & R practice" (GVR) beyond its traditional bounds. *Id.*, at 179 (SCALIA, J., dissenting). At the time, I remarked that "[t]he power to 'revise and correct' for error has become a power to void for suspicion" of error, *id.*, at 190 (quoting *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803); alterations omitted). And I predicted that "'GVR'd for clarification of _____'" would "become a common form of order, drastically altering the role of this Court." 516 U. S., at 185. Today, by vacating the judgment of a state court simply because "[i]f this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue," *ante*, at 3–4, the Court brings this prediction to fulfillment.

In *Lawrence*, I identified three narrow circumstances in which this Court could, consistent with the traditional understanding of our appellate jurisdiction (or at least consistent with entrenched practice), justify vacating a lower court's judgment *without first identifying error:* "(1) where an intervening factor has arisen [*e.g.*, new legislation or a recent judgment of this Court] that has a legal bearing upon the decision, (2) where, in a context not governed by *Michigan* v. *Long*, 463 U. S. 1032 (1983), clarification of the opinion below is needed to assure our jurisdiction, and (3) (in acknowledgment of established

practice, though not necessarily in agreement with its validity) where the respondent or appellee confesses error in the judgment below." 516 U. S., at 191–192 (dissenting opinion). Needless to say, today's novel GVR order falls into none of these categories. There has been no intervening change in law that might bear upon the judgment. Our jurisdiction is not in doubt, see *ante*, at 3; *State* v. *Frazier*, 162 W. Va. 935, 942, n. 5, 253 S. E. 2d 534, 538, n. 5 (1979) (petitioner's *Brady* claim was properly presented in his motion for a new trial). And the State has confessed no error—not even on the broadest and least supportable theory of what constitutes an error justifying vacatur. See, *e.g.*, *Alvarado* v. *United States*, 497 U. S. 543, 545 (1990) (Rehnquist, C. J., dissenting) (vacating when the Solicitor General confessed error in the lower court's "'analysis,'" but not its judgment); *Stutson* v. *United States*, 516 U. S. 193 (1996) *(per curiam)* (vacating when the Solicitor General confessed error in a position taken before the Court of Appeals, on which the court *might* have relied; discussed in *Lawrence*, *supra*, at 184–185 (SCALIA, J., dissenting)); *Department of Interior* v. *South Dakota*, 519 U. S. 919, 921 (1996) (SCALIA, J., dissenting) (vacating when "the Government, having *lost* below, wishes to try out a new legal position"). Here, the Court vacates and remands *in light of nothing*.

Instead, the Court remarks tersely that it would be "better" to have "the benefit" of the West Virginia court's views on petitioner's *Brady* claim, should we eventually decide to take the case. *Ante*, at 3–4. The Court thus purports to conscript the judges of the Supreme Court of Appeals of West Virginia to write what is essentially an *amicus* brief on the merits of an issue they have already decided, in order to facilitate our *possible* review of the merits at some later time. It is not at all clear why it would be so much "better" to have the full court below address the *Brady* claim. True, we often prefer to review

reasoned opinions that facilitate our consideration—though we *may* review even a summary disposition. See *Lawrence, supra*, at 186 (SCALIA, J., dissenting). But the dissenting judges in the case below discussed petitioner's *Brady* claim at some length (indeed, at greater length than appears in many of the decisions we agree to review), and argued that it was meritorious. See 217 W. Va. 535, 549–552, 618 S. E. 2d 544, 558–561 (2005) (Davis, J., joined by Starcher, J., dissenting). Since we sometimes review judgments with no opinion, and often review judgments with opinion only on one side of the issue, it is not clear why we need opinions on *both* sides here.

To tell the truth, there is only one obvious sense in which it might be "better" to have the West Virginia court revisit the *Brady* issue: If the majority suspects that the court below erred, there is a chance that the GVR-in-light-of-nothing will induce it to change its mind on remand, sparing us the trouble of correcting the suspected error. It is noteworthy that, to justify its GVR order, the Court does not invoke even the flabby standard adopted in *Lawrence*, namely whether there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," 516 U. S., at 167. That is because (there being no relevant intervening event to create such a probability) the only *possibility* that the West Virginia court will alter its considered judgment *is created by this Court's GVR order itself*. A case such as this, which meets none of the usual, outcome-neutral criteria for granting certiorari set forth in this Court's Rules 10(a)–(c), could attract our notice only if we suspected that the judgment appealed from was in error. Those whose judgments we review have sometimes viewed even our legitimate, intervening-event GVR orders as polite directives that they reverse themselves. See, *e.g.*, *Sharpe* v. *United States*, 712 F. 2d 65, 67 (CA4 1983) (Russell, J., dissenting) ("Once again, I

think the majority has mistaken gentleness in instruction for indefiniteness in command. The Supreme Court was seeking to be gentle with us but there is, I submit, no mistaking what they expected us to do"). How much more is that suspicion justified when the GVR order rests on nothing more than our statement that it would be "better" for the lower court to reconsider its decision (much as a mob enforcer might suggest that it would be "better" to make protection payments).

Even when we suspect error, we may have many reasons not to grant certiorari outright in a case such as this—an overcrowded docket, a reluctance to correct "the misapplication of a properly stated rule of law," this Court's Rule 10, or (in this particular case) even a neo-Victorian desire to keep the lurid phrases of the "graphically explicit note," *ante*, at 1, out of the U. S. Reports. But none of these reasons justifies "a tutelary remand, as to a schoolboy made to do his homework again." *Lawrence*, 516 U. S., at 185–186 (SCALIA, J., dissenting). In "the nature of the appellate system created by the Constitution and laws of the United States," *id.*, at 178, state courts and lower federal courts are constitutionally distinct tribunals, independently authorized to decide issues of federal law. They are not, as we treat them today, "the creatures and agents of this body," *id.*, at 178–179. If we suspect that a lower court has erred and wish to correct its error, we should grant certiorari and decide the issue ourselves in accordance with the traditional exercise of our appellate jurisdiction.

It is particularly ironic that the Court inaugurates its "GVR-in-light-of-nothing" practice by vacating the judgment of a *state* court. Our no-fault GVR practice had its origins "in situations calling forth the special deference owed to state law and state courts in our system of federalism." *Id.*, at 179. We first used it to allow the state court to decide the effect of an intervening change in state

law. *Ibid.* (citing *Missouri ex rel. Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U. S. 126 (1927)). Likewise, our other legitimate category of no-fault GVR—to ensure our own jurisdiction—"originate[d] in the special needs of federalism." *Lawrence*, 516 U. S., at 181. In vacating the judgment of a state court for no better reason than our own convenience, we not only fail to observe, but positively flout the "special deference owed to . . . state courts," *id.*, at 179. Like the Ouroboros swallowing its tail, our GVR practice has ingested its own original justification.

Chief Justice Marshall wrote in *Marbury* v. *Madison* that "[i]t is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted . . . ." 1 Cranch, at 175. At best, today's unprecedented decision rests on a finding that the state court's "opinion, though arguably correct, [is] incomplete and unworkmanlike," *Lawrence*, 516 U. S., at 189 (SCALIA, J., dissenting)—which all Members of the Court in *Lawrence* agreed was an illegitimate basis for a GVR, see *id.*, at 173 *(per curiam)*. At worst, it is an implied threat to the lower court, not backed by a judgment of our own, that it had "better" reconsider its holding.

I suppose it would be available to the West Virginia Supreme Court of Appeals, on remand, simply to reaffirm its judgment without further elaboration. Or it could instead enter into a full discussion of the *Brady* issue, producing either a reaffirmance or a revision of its judgment. The latter course will of course encourage and stimulate our new "GVR-in-light-of-nothing" jurisprudence. *Verb. sap.*

For these reasons, I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

DENVER A. YOUNGBLOOD, JR. *v.* WEST VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 05–6997. Decided June 19, 2006

JUSTICE KENNEDY, dissenting.

The Court's order to grant, vacate, and remand (GVR) in *Lawrence* v. *Chater*, 516 U. S. 163 (1996) *(per curiam)*, had my assent. In that case there was a new administrative interpretation that the Court of Appeals did not have an opportunity to consider. *Id.*, at 174. The Court today extends the GVR procedure well beyond *Lawrence* and the traditional practice of issuing a GVR order in light of some new development. See *id.*, at 166–167. Since the issuance of a GVR order simply for further explanation is, as JUSTICE SCALIA explains, see *ante*, p. ___, both improper and contrary to our precedents, I respectfully dissent.